265 N.C. App.—No. 4 Pages 603-694

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 22, 2020

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

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OF

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COURT OF APPEALS

CASES REPORTED

FILED 4 JUNE 2019

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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ADMINISTRATIVE LAW

Reinsurance—petition for reimbursement—discretionary authority—The trial court and the hearing officer for the Commissioner of Insurance erred by interpreting Rule 5.C.2 of the N.C. Reinsurance Facility Standard Practices Manual as not allowing any discretionary authority to reimburse an automobile insurer for an excess judgment. The plain language of the agency rule required the Facility's Board to consider a petition for reimbursement, but granted discretion to the Board regarding whether to reimburse any or all of the amount requested. Where the parties stipulated that petitioner insurer was not guilty of gross or willful or wanton mishandling of the claim, and the Board did not find otherwise, the sole exception to the Board's discretionary authority did not apply. **N.C. Reinsurance Facility v. Causey, 615.**

ARBITRATION AND MEDIATION

Arbitration rider—notice provision—no right to jury trial—N.C.G.S. § 22B-10—unconscionability—In a breach of contract action, the trial court erroneously concluded that the notice provision in an arbitration rider was unconscionable pursuant to the prohibition contained in N.C.G.S. § 22B-10 against contractual waivers of jury trials. The rider's explanation that a party who agreed to arbitration gave up the right to have a dispute resolved by jury did not run afoul of section 22B-10

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

IN RE A.R.C.

[265 N.C. App. 603 (2019)]

IN THE MATTER OF A.R.C., K.M.W., C.W.S.W., A.S.W.

No. COA18-791

Filed 4 June 2019

Termination of Parental Rights—assistance of counsel—silence during hearing—inadequacy of record on appeal

An appeal from an order terminating a mother's parental rights to her children was remanded where the mother argued that she received ineffective assistance of counsel based on her counsel's failure to advocate on her behalf during the termination hearing—counsel made no objections, performed no cross-examinations, presented no evidence, and made no arguments. Remand was necessary because the record was silent as to the reason for the mother's absence from the termination hearing and any reasoning behind her counsel's actions, or lack thereof.

Appeal by respondent from orders entered 26 April 2018 by Judge Mary F. Paul in Davidson County District Court. Heard in the Court of Appeals 9 May 2019.

Assistant Davidson County Attorney Sheri A. Woodyard for petitioner-appellee Davidson County Department of Social Services.

Anné C. Wright for respondent-appellant mother.

Stephen M. Schoeberle for guardian ad litem.

INMAN, Judge.

Respondent Mother ("Mother") appeals from orders terminating her parental rights with respect to each of her four children, A.R.C. ("Amy"), K.M.W. ("Kim"), C.W.S.W. ("Connor"), and A.S.W. ("Amber," collectively "the children"),[1] arguing that she was denied effective assistance of counsel because her trial counsel failed to advocate for her in the termination hearing. After careful review of the record and applicable law, we remand for the trial court to determine whether Mother is entitled to relief or whether termination is proper in the absence of a further hearing on the merits.

1. Pseudonyms are used to protect the identities of the children and for ease of reading.

I. FACTUAL AND PROCEDURAL HISTORY

In June 2015, Connor, who was just a few months old, was diagnosed with failure to thrive. Connor was hospitalized and immediately gained significant weight. On 11 August 2015, Mother entered into a case plan with the Davidson County Department of Social Services ("DSS"), which required her to obtain a mental health assessment, obtain stable housing and employment, ensure that the children were adequately fed, and keep a clean family home. Approximately three weeks later, a DSS social worker visited Mother's home and observed that Amy, Kim, and Connor and the home were not being taken care of as agreed. DSS asked Mother to place them in kinship care, to which she consented to having them live with a maternal aunt and the aunt's fiancé. While in kinship care, Kim required medical care, but her parents could not be located to give permission for her treatment.

On 14 October 2015, after DSS filed petitions alleging that Amy, Kim, and Connor were neglected and dependent juveniles, the trial court awarded nonsecure custody of them to DSS. On 21 March 2016, the trial court entered an order adjudicating the three children as neglected based on stipulated facts. The children remained in DSS custody but were placed with their maternal great-aunt.

In July 2016, Mother gave birth to Amber. A few days later, DSS filed a petition alleging that Amber was a neglected and dependent juvenile, noting that Mother had open DSS cases with her other three children and had not made suitable progress on her case plan. DSS obtained nonsecure custody of Amber and placed her in foster care with her three siblings. The trial court entered an order adjudicating Amber as neglected on 14 September 2016.

On 20 February 2017, DSS filed petitions to terminate Mother's parental rights to the children on the grounds of neglect, failure to make reasonable progress, and failure to pay a reasonable portion of the children's cost of care. Following a hearing on 30 November 2017, the trial court determined that Mother required a guardian *ad litem* pursuant to N.C. Gen. Stat. § 1A-1, Rule 17. The trial court found that Mother "lack[ed] sufficient capacity to manage her own affairs and to communicate important decisions due to mental illness and inebriety." Mother was later hospitalized to receive mental health treatment.

On 24 January 2018, nearly a year after DSS filed the petitions to terminate Mother's parental rights, her guardian *ad litem* accepted service of process of the petitions on her behalf. Mother's guardian *ad litem* and

her attorney were notified of a hearing on the petitions scheduled for 29 March 2018.

On the morning of the hearing, Mother's attorney filed an answer denying many of DSS's allegations and a motion to dismiss the petitions. Mother did not personally attend the hearing, but her guardian *ad litem* and her court-appointed attorney were present on her behalf. The trial court did not inquire into Mother's absence. Throughout the hearing, Mother's attorney did not object to any evidence presented by DSS, cross-examine DSS's witnesses, or present any evidence or arguments challenging termination.

On 26 April 2018, the trial court entered orders terminating Mother's parental rights based on neglect and failure to pay a reasonable portion of the children's cost of care. N.C. Gen. Stat. §§ 7B-1111(a)(1), (4) (2017). The trial court further concluded that termination was in the children's best interests. Mother filed timely notice of appeal.

II. ANALYSIS

Mother's sole argument is that she received ineffective assistance of counsel because her attorney failed to advocate for her during the termination hearing. Because the record on appeal is insufficient for adequate appellate review, we conclude that further proceedings in the trial court are necessary to resolve this issue.

" 'When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures,' which in North Carolina has been achieved in part through statutory provisions that ensure a parent's right to counsel[.]" *In re K.N.*, 181 N.C. App. 736, 737, 640 S.E.2d 813, 814 (2007) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753-54, 71 L. Ed. 2d 599, 606 (1982)). The statutory right to counsel "includes the right to effective assistance of counsel." *In re Bishop*, 92 N.C. App. 662, 665, 375 S.E.2d 676, 678 (1989). "To prevail in a claim for ineffective assistance of counsel, respondent must show: (1) her counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) her attorney's performance was so deficient she was denied a fair hearing." *In re J.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005).

A. Deficient Performance

Mother contends that her attorney was deficient because he failed to advocate on her behalf during the termination hearing. *See In re S.N.W.*, 204 N.C. App. 556, 560, 698 S.E.2d 76, 79 (2010) ("It is well established that attorneys have a responsibility to advocate on the behalf of their

clients."). The transcript reflects that, as the termination hearing was about to begin, Mother's absence was acknowledged, but no reasons for the absence were discussed. On the morning of the hearing, Mother's attorney had filed answers to the termination petitions and moved for the trial court to consider them, which it did.

But once the hearing began, Mother's attorney ceased to advocate. While he remained present in the courtroom, Mother's attorney did not object during the testimony of DSS's witnesses, did not cross-examine those witnesses, and did not present any evidence.[2] At the conclusion of both the adjudication and dispositional phases of the hearing, Mother's attorney did not make any argument on her behalf.

The transcript and the remainder of the record on appeal is insufficient for this Court to adjudicate Mother's ineffective assistance of counsel claim. As an appellate court, we can only know what is included in the record before us. *See State v. Lawson*, 310 N.C. 632, 641, 314 S.E.2d 493, 499 (1984) ("[T]his Court is bound on appeal by the record on appeal as certified and can judicially know only what appears in it."), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). The record here provides only limited evidence regarding Mother's relationship with her attorney, and neither the parties nor the trial court addressed the issue on the record with sufficient enough detail at the termination hearing.

Of particular concern here is the period between when Mother was appointed a substitutive guardian *ad litem* and the termination hearing. Mother attended the hearing that resulted in an order appointing a guardian *ad litem*; however, she did not attend the only permanency planning hearing conducted between that appointment and the termination hearing. The order entered in the permanency planning hearing indicated that Mother "was admitted to High Point Regional Hospital after November 30, 2017, due to her severe mental health needs, depression, and suicidal ideations." But neither the termination order nor any other trial court order addresses what happened to Mother between her hospital admission and the termination hearing.

On this record, we cannot determine why Mother did not attend the termination hearing, or what her condition was on the date of the

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2. Mother's Rule 17 guardian *ad litem* was also given the opportunity to question witnesses and offer arguments on Mother's behalf, but declined to do so. This Court has held that "Rule 17 contemplates active participation of a GAL in the proceedings for which the GAL is appointed." *In re A.S.Y.*, 208 N.C. App. 530, 538, 703 S.E.2d 797, 802 (2010). However, because Mother does not present any issues regarding her guardian *ad litem*'s conduct on appeal, we will not address it further.

hearing. Nor can we determine whether Mother had contact with her attorney or her guardian *ad litem* or what instructions she may have given them about her cases. Mother's attorney did indeed file answers denying the allegations in the petitions on the morning of the termination hearing, suggesting that the attorney had some reason to believe that she wanted to contest the termination and that the attorney believed there was a good faith basis to do so. Yet Mother's attorney did nothing to advocate for Mother once the termination hearing began. Nothing in the record explains this discrepancy.

Mother's attorney's general silence during the termination hearing is puzzling, but without knowing the reasons for this silence, we cannot determine whether this lack of advocacy constituted deficient representation. At best, we can only engage in speculation as to the reasons why counsel did not advocate for Mother. *Cf. State v. Taylor*, 79 N.C. App. 635, 637, 339 S.E.2d 859, 861 ("While we find the absence of positive advocacy at the sentencing hearing troublesome, we do not believe we can hold, on this record, that it constituted deficient performance prejudicial to the defendant."), *disc. review denied*, 317 N.C. 340, 346 S.E.2d 146 (1986).

Because additional facts regarding the reasons behind counsel's actions are needed to resolve Mother's claim that she was denied a fair hearing, the appropriate remedy is to remand to the trial court so that it may find those facts and make a determination as to the adequacy of counsel's representation. *See In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79 ("[W]e remand for determination by the trial court regarding efforts by Respondent's counsel to contact and adequately represent Respondent at the termination of parental rights hearing and whether Respondent is entitled to appointment of counsel in a new termination of parental rights proceeding."); *cf. State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) ("Indeed, because of the nature of IAC claims, defendants likely will not be in a position to adequately develop many IAC claims on direct appeal."), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). On remand, the trial court should inquire into "efforts by [Mother's] counsel to contact and adequately represent [her] at the termination of parental rights hearing" and determine "whether [she] is entitled to appointment of counsel in a new termination of parental rights proceeding." *In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79; *see also In re D.E.G.*, 228 N.C. App. 381, 386-87, 747 S.E.2d 280, 284 (2013) ("[B]efore . . . relieving an attorney from any obligation to actively participate in a termination of parental rights proceeding when the parent is absent from a hearing, the trial court must inquire into the efforts

made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected.").

B. Prejudice

Both DSS and the children's guardian *ad litem* encourage us to hold that Mother's ineffective assistance claim must fail because, even if her counsel was deficient, she cannot show prejudice from her counsel's allegedly deficient conduct. If we were to follow this argument, then counsel's total lack of advocacy throughout the termination hearing would be immaterial as not even the most compelling advocate would have changed the outcome and stopped the trial court from terminating Mother's parental rights. This is not a conclusion we can reach from the sparse record before us. *See In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79 ("We are mindful that the record is replete with evidence which casts doubt on Respondent's ability to parent. Nonetheless, Respondent is entitled to procedures which provide him with fundamental fairness in this type of action."). We decline to speculate about what trial counsel "could have" argued or presented below or how it would have affected the outcome of the case without being privy to counsel's knowledge of the underlying facts. If a prejudice determination is necessary, it should be made by the trial court, after it is in full possession of all the facts surrounding counsel's and Mother's conduct and the facts of the case.

III. CONCLUSION

This Court has made clear that certain "procedural safeguards . . . must be followed to ensure the fundamental fairness of termination proceedings." *Id.* (quotations omitted). Because the record before us is silent as to Mother's attorney's justification for his actions during the termination hearing, the appropriate remedy is to remand to the trial court for a hearing to determine whether counsel's actions were deficient, and, if so, whether those deficiencies deprived Mother of a fair hearing. *See In re M.G.*, 239 N.C. App. 77, 83, 767 S.E.2d 436, 441 (2015) ("[T]his Court has consistently vacated or remanded [termination of parental rights] orders when questions of 'fundamental fairness' have arisen due to failures to follow basic procedural safeguards." (citation omitted)). Accordingly, this case is remanded to the trial court to determine whether Mother received ineffective assistance of counsel.

REMANDED.

Judges STROUD and ZACHARY concur.

IN RE C.D.H.

[265 N.C. App. 609 (2019)]

IN THE MATTER OF C.D.H.

No. COA18-601

Filed 4 June 2019

Termination of Parental Rights—assistance of counsel—silence during hearing—inadequacy of record on appeal

An appeal from an order terminating a mother's parental rights to her child was remanded where the mother argued that she received ineffective assistance of counsel based on her counsel's failure to advocate on her behalf during the termination hearing—counsel made no objections, performed no cross-examinations, presented no evidence, and made no arguments. Remand was necessary because the record was silent as to the reason for the mother's absence from the termination hearing and any reasoning behind her counsel's actions, or lack thereof.

Appeal by respondent from order entered 7 March 2018 by Judge Lora C. Cubbage in District Court, Guilford County. Heard in the Court of Appeals 9 May 2019.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

Sean P. Vitrano for respondent-appellant mother.

Brooks, Pierce, McLendon, Humphrey & Leonard LLP, by James T. Williams, Jr., and Sarah M. Saint, for guardian ad litem.

STROUD, Judge.

Respondent-mother appeals from an order terminating her parental rights[1] to C.D.H. ("Connor").[2] Because the record before this Court is silent on the reasons for mother's absence from the hearing and from mother's counsel's justification for her actions during the termination hearing, we remand for further proceedings.

1. Connor's father relinquished his parental rights and is not a party to this appeal.

2. A pseudonym is used to protect the identity of the minor child and for ease of reading.

I. Background

On 8 September 2016, the Guilford County Department of Health and Human Services ("DHHS") filed a petition alleging that Connor was a neglected and dependent juvenile. DHHS detailed Mother's history of substance abuse, mental health issues, and unstable housing. Because of these problems, Mother agreed to allow Connor to reside in a kinship placement with his maternal great-uncle and great-aunt beginning in May 2016. These relatives later asked for Connor to be removed from their home, and, on 11 October 2016, DHHS placed him in foster care.

On 14 September 2016, the trial court held a hearing to determine the need for continued nonsecure custody of the child. Mother attended this hearing, and the trial court set the next hearing for 9 November 2016. On that date, the trial court held a hearing for pre-adjudication, adjudication, and disposition; Mother did not attend. At the pre-adjudication hearing, Mother's counsel made an oral motion to continue due to Mother's absence. The trial court denied the motion, finding that Mother was present in court on 14 September 2016 when the case was set for hearing for 9 November; the social worker had spoken to mother on the phone on 8 November 2016 to remind her of the hearing; Mother had not maintained contact with her counsel since the prior court date; and, there was no valid reason to excuse her absence. On 7 December 2016, the trial court filed its order based upon the 9 November hearing adjudicating Connor as a neglected juvenile. Mother was ordered to enter into and cooperate with a case plan addressing her issues with housing, employment, parenting skills, mental health, and substance abuse. Mother was granted one hour of supervised visitation per week.

On 16 December 2016, the trial court held a Juvenile Court Infant/Toddler Initiative ("JCITI") status review hearing and entered an order noting Mother's noncompliance with her case plan; again, Mother was not present. The trial court noted that Mother had attended only two of six visits with the child and that she was "in the process of complying" with the "parenting/psychological evaluation" and obtaining employment, but she had failed to comply with any other requirements.

On 13 January, 2017, the trial court held another JCITI status review hearing; once again, Mother did not attend. The court found her level of compliance with her plan had decreased since the prior hearing, although she continued to visit with Connor erratically and maintained some contact with DSS.

On 8 February 2017, the trial court held a permanency planning hearing; once again, Mother did not attend, although her counsel was

present on her behalf. On 10 March 2017, the trial court entered its permanency planning order which found that Mother had still not entered into her required case plan. The court set the primary permanent plan as adoption with a secondary plan of reunification and ordered DHHS to seek to terminate Mother's rights within 60 days.

On 13 April 2017, DHHS filed a motion in the cause to terminate Mother's parental rights on the grounds of neglect, failure to pay a reasonable portion of Connor's cost of care, and dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1),(3),(6) (2017). Hearings on the motion to terminate were scheduled and continued several times, usually due to the court's inability to hear the case due to other cases in progress.

On 26 July 2017, the trial court held a permanency planning hearing; once again, Mother was not present in court but her counsel was present on her behalf. The trial court found that Mother still had not entered into her case plan. She was visiting with the child some, although inconsistently, but she did "for the most part" maintain "contact with the Court, The Department, and the Guardian ad Litem."

The motion for termination was scheduled for hearing on 5 December 2017. Mother's counsel made a motion to continue the hearing, but the trial court denied her motion, finding that "Respondent Mother represented to her attorney that she has a Court date today in High Point to address a traffic matter. The Court reviewed the Court database and there is no matter scheduled for [Mother] today." However, the trial court did continue the hearing for other reasons, noting that "extraordinary circumstances making it necessary to extend the 90 day trial requirement for the proper administration of justice[,]" and the hearing was set for 30 January 2018. On 10 January 2018, the trial court held another permanency planning hearing. Again, Mother was not present but her counsel was present.

The motion for termination was heard on 13 February 2018. Mother was not present in court but was represented by her court-appointed attorney. Mother's counsel did not advise the trial court of any attempts to contact Mother, move to continue the hearing, object to any evidence presented at the hearing, cross-examine DHHS' witnesses, and or present evidence or arguments on Mother's behalf.

On 7 March 2018, the trial court entered an order terminating Mother's parental rights to Connor. The court concluded that all three grounds for termination alleged by DHHS existed and that termination was in Connor's best interest. Mother timely filed notice of appeal.

II. Ineffective Assistance of Counsel

Mother's sole argument is that she received ineffective assistance of counsel ("IAC") because her trial counsel did nothing to advocate on her behalf during the termination hearing.

"When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *In re K.N.*, 181 N.C. App. 736, 741, 640 S.E.2d 813, 817 (2007) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753-54, 71 L. Ed. 2d 599, 606 (1982)). North Carolina provides indigent parents facing the termination of their parental rights with a statutory right to the assistance of counsel "unless the parent waives the right." N.C. Gen. Stat. § 7B-1101.1(a) (2017). This statutory right "includes the right to effective assistance of counsel." *In re Bishop*, 92 N.C. App. 662, 665, 375 S.E.2d 676, 678 (1989). "To prevail in a claim for ineffective assistance of counsel, respondent must show: (1) her counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) her attorney's performance was so deficient she was denied a fair hearing." *In re J.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005).

A. Deficient Performance

Mother first contends that her counsel's failure to advocate for her at the termination hearing constituted deficient performance. *See In re S.N.W.*, 204 N.C. App. 556, 560, 698 S.E.2d 76, 79 (2010) ("It is well established that attorneys have a responsibility to advocate on the behalf of their clients."). The transcript reflects that when the termination hearing began, Mother was not present, and neither counsel nor the trial court addressed Mother's absence.[3] Mother's attorney remained present in the courtroom while the hearing was conducted, but she did not object during the testimony of DHHS' witnesses, did not cross-examine those witnesses, and did not present any evidence. At the conclusion of both the adjudication and dispositional phases of the hearing, Mother's counsel declined to make any argument on her behalf. Mother contends that counsel's lack of advocacy fell below any "objective standard of reasonable representation."

The record on appeal contains insufficient information to allow us to review Mother's claim, because it is silent on the reasons why counsel acted as she did. As an appellate court, we can only know what is

3. We recognize the possibility that the trial court and counsel discussed Mother's absence off the record, but we can review only what is shown by the transcript and record on appeal.

included in the record before us. *See State v. Lawson*, 310 N.C. 632, 641, 314 S.E.2d 493, 499 (1984) ("[T]his Court is bound on appeal by the record on appeal as certified and can judicially know only what appears in it."). The record here provides very limited evidence regarding Mother's relationship with her counsel. The orders entered by the trial court indicate Mother attended only one hearing in the entire case, the nonsecure custody hearing on 9 September 2016. After that, she did not attend court for any of the hearings conducted throughout this case. The orders also show she was consistently represented by the same trial counsel at each hearing, but except for her counsel's motions to continue on 9 November and 5 December 2017, there is no other information about Mother's reasons for her absence or her counsel's communication with her about attending court. The orders did contain findings that Mother generally stayed in contact with DHHS and engaged in visits with Connor while the case progressed, including after the motion for termination was filed. In fact, her last visit with Connor was on 17 December 2017, less than three months before the termination hearing.

Because of her failure to attend any court hearings since the first hearing in September 2016, Mother may have waived her right to effective counsel through her own actions. *See In re R.R.*, 180 N.C. App. 628, 636, 638 S.E.2d 502, 507 (2006); *Bishop*, 92 N.C. App. at 666-67, 375 S.E.2d at 679-80 (holding that counsel will not be deemed ineffective when their alleged deficiencies are attributable to their client's conduct); *In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79 ("[A] lawyer cannot properly represent a client with whom he has no contact."). Perhaps Mother's cooperation with her counsel was no better than her cooperation with her case plan, but the record does not compel that conclusion, so we cannot determine whether she waived her right to representation or undermined her counsel's ability to advocate for her. We can only engage in speculation on the reasons why counsel did not advocate on Mother's behalf.

Counsel's failure to advocate for Mother is not necessarily an indication of ineffective assistance of counsel. Counsel certainly said nothing negative regarding Mother, and it is possible that "resourceful preparation reveal[ed] nothing positive to be said for" Mother. *See State v. Davidson*, 77 N.C. App. 540, 546, 335 S.E.2d 518, 522 (1985). But we cannot make any determination from this record.

Since we do not have a sufficient record to determine if Mother waived her right to effective counsel by her failure to participate or other potential reasons for counsel's lack of advocacy, the appropriate remedy is to remand to the trial court so it may find those facts. *See In*

re S.N.W., 204 N.C. App. at 561, 698 S.E.2d at 79 ("[W]e remand for determination by the trial court regarding efforts by Respondent's counsel to contact and adequately represent Respondent at the termination of parental rights hearing and whether Respondent is entitled to appointment of counsel in a new termination of parental rights proceeding."); *cf. State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) ("Indeed, because of the nature of IAC claims, defendants likely will not be in a position to adequately develop many IAC claims on direct appeal."). On remand, the trial court should inquire into "efforts by Respondent's counsel to contact and adequately represent Respondent at the termination of parental rights hearing" and determine "whether Respondent is entitled to appointment of counsel in a new termination of parental rights proceeding." *In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79; *see also In re D.E.G.*, 228 N.C. App. 381, 386-87, 747 S.E.2d 280, 284 (2013) ("[B]efore . . . relieving an attorney from any obligation to actively participate in a termination of parental rights proceeding when the parent is absent from a hearing, the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected.").

B. Prejudice

Both DHHS and the guardian *ad litem* encourage us to hold that Mother's ineffective assistance claim must fail because, even if her counsel was deficient, she cannot show prejudice from her counsel's allegedly deficient conduct. Under this theory, counsel's total lack of advocacy throughout the termination hearing is immaterial, because even the most compelling advocacy would not have changed the outcome and stopped the trial court from terminating Mother's parental rights. This is not a conclusion we can reach from the sparse record before us. We decline to speculate about what trial counsel "could have" argued below or how it would have affected the outcome, without being privy to counsel's knowledge of the underlying facts. If a prejudice determination is necessary, the trial court should make this determination after it has received evidence regarding the facts surrounding counsel's conduct, mother's participation in the case, and other relevant circumstances.

III. Conclusion

This Court has a duty to ensure that Mother received a fair hearing, and we must adhere to our prior admonition that "procedural safeguards . . . must be followed to ensure the 'fundamental fairness' of termination proceedings." *In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 796. Since the record before us is silent on counsel's justification for

her actions during the termination hearing, the appropriate remedy is to remand to the trial court for a hearing to determine whether counsel's actions were deficient, and, if so, whether counsel's deficiencies deprived the parent of a fair hearing. *See In re M.G.*, 239 N.C. App. 77, 83, 767 S.E.2d 436, 441 (2015) ("[T]his Court has consistently vacated or remanded [termination of parental rights] orders when questions of 'fundamental fairness' have arisen due to failures to follow basic procedural safeguards."). Accordingly, this case is remanded to the trial court to determine if Mother received ineffective assistance of counsel and for any further proceedings required depending upon the trial court's determination regarding assistance of counsel.

REMANDED.

Judges INMAN and ZACHARY concur.

THE NORTH CAROLINA REINSURANCE FACILITY, PETITIONER
v.
MIKE CAUSEY, COMMISSIONER OF THE NORTH CAROLINA DEPARTMENT OF INSURANCE, AND ALLSTATE INDEMNITY COMPANY, RESPONDENTS

No. COA18-1303

Filed 4 June 2019

Administrative Law—reinsurance—petition for reimbursement—discretionary authority

The trial court and the hearing officer for the Commissioner of Insurance erred by interpreting Rule 5.C.2 of the N.C. Reinsurance Facility Standard Practices Manual as not allowing any discretionary authority to reimburse an automobile insurer for an excess judgment. The plain language of the agency rule required the Facility's Board to consider a petition for reimbursement, but granted discretion to the Board regarding whether to reimburse any or all of the amount requested. Where the parties stipulated that petitioner insurer was not guilty of gross or willful or wanton mishandling of the claim, and the Board did not find otherwise, the sole exception to the Board's discretionary authority did not apply.

Appeal by petitioner from order entered 6 September 2018 by Judge R. Allen Baddour, Jr. in Wake County Superior Court. Heard in the Court of Appeals 7 May 2019.

Young Moore and Henderson, P.A., by Walter E. Brock, Jr. and Angela Farag Craddock, for petitioner-appellant.

Parker Poe Adams & Bernstein LLP, by Catharine Biggs Arrowood, for respondent-appellee.

ARROWOOD, Judge.

The North Carolina Reinsurance Facility ("petitioner" or "the Facility") appeals from the superior court's order denying petitioner's petition for review and affirming an order of the North Carolina Commissioner of Insurance ("the Commissioner") that reversed petitioner's denial of a reimbursement to Allstate Indemnity Company ("respondent" or "Allstate"). For the reasons that follow, we reverse and remand.

I. Background

On 25 October 2007, Allstate issued an automobile insurance policy to Mr. Jason T. Crouse ("Mr. Crouse") that was ceded to the Facility, "a nonprofit unincorporated legal entity . . . consisting of all insurers licensed to write and engaged in writing within this State motor vehicle insurance or any component thereof[,]" N.C. Gen. Stat. § 58-37-5 (2017), "which insures drivers who the insurers determine they do not want to individually insure." *Discovery Ins. Co. v. N.C. Dep't of Ins.*, __ N.C. App. __, __, 807 S.E.2d 582, 585 (2017) (citation and internal quotation marks omitted).

Mr. Crouse purchased this policy through Allstate agent Ms. Jeannie Scott ("Ms. Scott") in North Carolina. Less than a month later, on 2 November 2007, Mr. Crouse was involved in an automobile accident in Clearwater, Florida. Mr. Crouse's vehicle collided with a bicycle operated by a minor, Mr. Matthew R. Hanna ("Mr. Hanna"). Mr. Hanna suffered traumatic brain damage and other serious injuries.

Mr. Crouse reported the accident to Ms. Scott on 5 November 2007. She informed him that he had to call a 1-800-Allstate telephone number to report the loss. However, there is no indication in the record that Mr. Crouse ever called the 1-800-Allstate telephone number, nor that Allstate received any additional notice of the claim until after Mr. Hanna's parents had hired counsel. The Hannas filed a complaint against Mr. Crouse in Florida state court on 15 January 2008, seeking damages from the accident.

On 18 January 2008, a paralegal in the law office representing the Hannas called the 1-800-Allstate telephone number to report the claim,

but did not notify Allstate that legal action had commenced against Mr. Crouse. Allstate opened a claim file and began investigating the claim that same day. The adjuster assigned to the case interviewed Mr. Crouse, hired counsel to represent him, and created an accident reconstruction. Within five days, Allstate authorized the tender of the policy limit of $50,000.00 to the Hannas on 23 January 2008. Allstate formally tendered this offer on 1 February 2008. The Hannas rejected this offer on 14 February 2008.

Mr. Crouse entered into a stipulated settlement with the Hannas on 6 September 2012, whereby he consented to the entry of a $13,800,000.00 judgment against him and assigned his "claims, rights, and interests in the policy . . . as against Allstate . . . for any failure to settle or otherwise administer his automobile claims arising out of the Accident." As part of this settlement, the Hannas agreed not to take affirmative actions to record or execute the judgment against Mr. Crouse. The final judgment was entered on 7 September 2012.

The Hannas filed a complaint against Allstate in the Middle District of Florida on 10 September 2012. The complaint alleged Allstate breached its duty of good faith to Mr. Crouse by failing to: (1) timely and reasonably affirmatively seek out a settlement of the claims in the Hanna matter; (2) communicate the exposure Mr. Crouse faced, and to offer advice on how to minimize this exposure; and (3) adopt and implement standards and procedures for timely and proactive investigation and resolutions of claims and/or failing to follow such standards Allstate had adopted. The matter went to trial, and the jury returned a verdict on 3 March 2014 that determined Allstate had acted in bad faith by failing to settle the claims arising out of the Hanna matter. The trial court entered a $13,800,000.00 judgment against Allstate on 4 February 2014. Allstate appealed the judgment, but eventually settled the matter on 29 September 2015 for $11,000,000.00.

Allstate filed a petition for reimbursement with the Facility on 30 October 2015. The Facility's claims committee heard the matter on 1 February 2017. On 9 May 2017, the claims committee recommended the denial of Allstate's petition. Allstate objected to the claims committee's recommendation, and requested a hearing before the Facility's Board ("the Board"). The Board heard the matter, and denied the petition for reimbursement on 14 July 2017.

Allstate appealed to the Commissioner pursuant to N.C. Gen. Stat. § 58-37-65(a) (2017). The matter came on for hearing before the Commissioner's designated hearing officer, Hearing Officer A. John

Hoomani, Esq., on 30 October 2017. The Commissioner ordered the Board to reconsider its ruling because its denial of Allstate's petition was not in accordance with the Facility Act, the Facility's Plan of Operation, and the Facility's Standard Practice Manual.

The Facility petitioned for judicial review of the Commissioner's order on 21 December 2017, and named both Allstate and the Commissioner as a respondent on appeal. The Commissioner moved to dismiss himself as a party.

The matter came on for hearing before the Honorable R. Allen Baddour, Jr. on 31 July 2018 in Wake County Superior Court. The trial court granted the Commissioner's motion to dismiss, entered an order denying the Facility's petition for review, and affirmed the Commissioner's order.

The Facility appeals.

II. Discussion

Petitioner argues the trial court erred by affirming the Commissioner's order because the Commissioner: (1) failed to apply paragraph C.2. of Section 5 of the Facility's Standard Practice Manual ("Rule 5.C.2.") according to its plain meaning; and (2) erroneously determined petitioner's grounds for the denial of Allstate's petition were not in accordance with the Facility Act, the Facility's Plan of Operation, and the Facility's Standard Practice Manual. We agree with petitioner that the superior court's affirming the Commissioner was error due to failure to apply Facility Rule 5.C.2. according to its plain meaning. Therefore, we reverse and remand, and do not reach the second issue on appeal.

A. Standard of Review

All of the Commissioner's rulings or orders made pursuant to N.C. Gen. Stat. § 58-37-65 of the Facility Act are "subject to judicial review as approved in G.S. 58-2-75." N.C. Gen. Stat. § 58-37-65(f) (2017). N.C. Gen. Stat. § 58-2-75 (2017) provides that, generally, "[a]ny order or decision made, issued or executed by the Commissioner" is "subject to review in the Superior Court of Wake County on petition by any person aggrieved filed within 30 days from the date of the delivery of a copy of the order or decision made by the Commissioner upon such person." N.C. Gen. Stat. § 58-2-75. "N.C. Gen. Stat. § 58-2-75 is to be read in conjunction with N.C. Gen. Stat. § 150B-51 of the Administrative Procedure Act[.]" *Discovery Ins. Co.*, __ N.C. App. at __, 807 S.E.2d at 587 (citing *N.C. Reinsurance Facility v. Long*, 98 N.C. App. 41, 46, 390 S.E.2d 176, 179 (1990)).

N.C. Gen. Stat. § 150B-51(b) provides:

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2017). Our Court reviews errors asserted "pursuant to subdivisions (1) through (4) of subsection (b) of this section . . . using the de novo standard of review." N.C. Gen. Stat. § 150B-51(c). With regard to errors asserted "pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court" reviews "the final decision using the whole record standard of review." *Id.*

> Under the whole record test, [the reviewing court] may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision.

Discovery Ins. Co., __ N.C. App. at __, 807 S.E.2d at 587 (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004)) (internal quotation marks omitted) (alteration in original). "Substantial evidence means relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8c) (2017) (internal quotation marks omitted).

B. The Plain Meaning of Facility Rule 5.C.2.

The Facility argues the superior court's judgment is erroneous because the Commissioner had committed an error of law by failing to apply Rule 5.C.2. of the Facility's Standard Practice Manual according to its plain meaning. Additionally, the Facility contends the judgment appealed from is erroneous because the Commissioner exceeded his statutory authority by committing this error of law.

We review questions of law in cases appealed from administrative tribunals *de novo*. N.C. Gen. Stat. § 150B-51(c); *Discovery Ins. Co.*, __ N.C. App. at __, 807 S.E.2d at 587. "When the language of regulations is clear and unambiguous, there is no room for judicial construction, and courts must give the regulations their plain meaning." *Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998) (citation omitted).

The Facility's Standard Practice Manual was established pursuant to N.C. Gen. Stat. § 58-37-35(g)(8), which provides:

> (g) Except as may be delegated specifically to others in the plan of operation or reserved to the members, power and responsibility for the establishment and operation of the Facility is vested in the Board of Governors, which power and responsibility include but is not limited to the following:
>
> . . . .
>
> (8) To establish fair and reasonable procedures for the sharing among members of any loss on Facility business that cannot be recouped under G.S. 58-37-40(e) and other costs, charges, expenses, liabilities, income, property and other assets of the Facility and for assessing or distributing to members their appropriate shares. . . .

N.C. Gen. Stat. § 58-37-35(g)(8) (2017). Section 5 of the Standard Practice Manual contains general information about a member company's responsibility regarding claims management. Subsection C of Section 5 addresses the procedure for presenting excess judgments or other legal actions against companies to the Facility, such as the excess judgment in the instant case.

Rule 5.C.2. of this section provides, in pertinent part:

> The Governing Board shall consider the petition, and may at any time prior to judgment against the petitioner or thereafter authorize the Facility to contribute any part of sums required to satisfy the excess judgment against the insured or the judgment or potential judgment against the petitioner, unless it is the determination of the Board of Governors that the petitioner was guilty of gross or willful or wanton mishandling, in which event the petition shall be denied.

N.C. Reinsurance Facility Standard Practice Manual 5-1, Rule 5.C.2. (2014).

Here, the superior court affirmed the Commissioner holding that "the only reasonable interpretation of" this Rule, "when read in conjunction with the enabling legislation," "is that a petition for reimbursement will be approved by the Facility unless the member company has engaged in 'gross or willful or wanton mishandling' of the claim." Therefore, the superior court agreed with the Commissioner's reasoning that because the Facility and Commissioner had agreed and found Allstate was not guilty of gross or willful or wanton mishandling of the claim, Rule 5.C.2. required the Facility to reimburse Allstate for the $11,000,000.00 settlement.

On appeal, petitioner contends the superior court's and the Commissioner's interpretation is contrary to the plain meaning of Rule 5.C.2. Specifically, petitioner argues under Rule 5.C.2., the Board has full discretionary authority to approve or deny Allstate's petition for reimbursement. We agree.

The first clause of the disputed text provides: "The Governing Board *shall* consider the petition" for reimbursement. (Emphasis added). "It is well established that the word 'shall' is generally imperative or mandatory." *Puckett v. Norandal USA, Inc.*, 211 N.C. App. 565, 573, 710 S.E.2d 356, 362 (2011) (citation and internal quotation marks omitted). Here, "shall" is an auxiliary verb to the main verb, "consider[.]" Therefore, this clause mandates that the Board must consider each petition for an excess judgment or other legal action against the member companies.

After the first clause, there is a comma, and the conjunction "and" begins the second clause; thus, the second clause still refers to the action taken by the Board upon consideration of the petition. The second clause states: "and *may* at any time prior to judgment

against the petitioner or thereafter *authorize* the Facility to contribute any part of sums required to satisfy the excess judgment against the insured or the judgment or potential judgment against the petitioner." (Emphasis added).

Here, "may" is the auxiliary verb to the main verb, "authorize." "The use of the word 'may' has been interpreted by our Supreme Court to connote discretionary power, rather than an obligatory one." *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 250-51, 652 S.E.2d 713, 717 (2007) (citing *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 402-403, 584 S.E.2d 731, 737 (2003); *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978)) (citation omitted). Because "may" is auxiliary to "authorize[,]" the plain language of this rule mandates that the Facility's power to "authorize the Facility to contribute any part of sums required to satisfy the excess judgment against the insured or the judgment or potential judgment against the petitioner" is discretionary and not mandatory.

The phrase "to *contribute any part of sums* required to satisfy the . . . judgment" clearly authorizes the Facility with the discretionary power to contribute any part of sums required to satisfy the excess judgment. (Emphasis added). "Contribute[,]" used as a transitive verb, means "to give or supply in common with others[.]" Merriam-Webster Dictionary (2014).

Rule 5.C.2. explains that "*any* part of sums required to satisfy . . . the judgment" may be contributed. (Emphasis added). "Any" is an adjective that describes "some, no matter how much or how little, how many, or what kind[.]" *Id.* These words read together plainly provide that the Facility has full discretion to authorize a full or partial contribution, or no contribution.

After the second clause, there is a comma, followed by the final clause of the sentence: "*unless* it is the determination of the Board of Governors that the petitioner was guilty of gross or willful or wanton mishandling, in which event the petition *shall* be denied." (Emphasis added). The word "unless" signals that this clause contains an exception. The plain language of this clause states that this exception limits the Facility's discretion: the Facility "shall" deny the petition for reimbursement if the Board determines "the petitioner was guilty of gross or willful or wanton mishandling."

In sum, the plain language reading of Rule 5.C.2. provides that, although the Board must consider all petitions for reimbursement, it has full discretionary authority to approve or deny these petitions, unless the Board determines "the petitioner was guilty of gross or willful or wanton mishandling." Because the parties stipulated and the Board did

not find petitioner guilty of gross or willful or wanton mishandling, the Board had full discretionary authority to approve or deny Allstate's petition for reimbursement in whole or in part.

Despite the plain language in Rule 5.C.2., respondent contends the General Assembly could not have intended for the Board to have such discretion because it would not intend for the Board to make arbitrary determinations without determining principles. The superior court's judgment affirming the Commissioner's order is based in part on this argument, and concludes that reading Rule 5.C.2. as granting the Board full discretionary authority over all petitions wherein the petitioner was not guilty of gross or willful or wanton mishandling of a claim would create arbitrary results because the Facility's discretion is "unfettered[.]" The respondent and the Commissioner relies on *Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 710 S.E.2d 350 (2011) to support this assertion, which "held that when an administrative body establishes certain requirements without the use of any determining principles from its guidelines, then the administrative body's decision is clearly arbitrary." (Emphasis in original).

Sanchez involved a superior court order that affirmed a Board of Adjustment's decision to reverse a town's Historic Preservation Commission ("Historic Commission")'s decision to deny an application for a certificate of appropriateness. *Sanchez*, 211 N.C. App. at 575, 710 S.E.2d at 351. The Historic Commission denied the application because it determined "structure[s] on [the petitioner's] property over twenty-four feet in height would be incongruous with the historic district[.]" *Id.* at 580, 710 S.E.2d at 354 (footnote omitted). The Board of Adjustment held this requirement was arbitrary and capricious, and our Court agreed, explaining that the whole record did not contain substantial evidence to support the twenty-four feet height requirement because:

> While there was evidence presented before the [Historic Commission] that there were other one-and-one-half story structures in the historic district that ranged between twenty and twenty-two feet in height, there was also evidence presented that the residences closest to the [petitioner's] property ranged from twenty-six to thirty-five feet in height. N.C. Gen. Stat. § 160A-400.9 does not permit the [Historic Commission] to "cherry pick" certain properties located within the historic district in order to determine the congruity of proposed construction; instead, the [Historic Commission] must determine congruity

> contextually, based upon "the total physical environment of the Historic District."

Id. at 580-81, 710 S.E.2d at 354-55 (citation omitted). The Court held: "An administrative ruling is deemed arbitrary and capricious when it is whimsical, willful, and an unreasonable action without consideration or in disregard of facts or law or without determining principle." *Id.* at 580, 710 S.E.2d at 354.

In the respondent's view, the plain reading of Rule 5.C.2. as described by this Court, is contrary to *Sanchez* because it empowers the Facility with the discretion to make arbitrary decisions, in disregard of facts or law or without determining principle. However, the Facility Act and Rule 5.C.2. in the instant case is distinguishable from the ordinance in *Sanchez* in that it involves a remedial statutory scheme. *See Discovery Ins. Co.*, __ N.C. App. at __, 807 S.E.2d at 588 ("The Facility Act is remedial in nature and is to be construed liberally" "in a manner which assures fulfillment of the beneficial goals for which it is enacted and which brings within it all cases fairly falling within its intended scope.") (citations and internal quotation marks omitted).

Therefore, our Court's analysis in *Henry v. N.C. Dep't of Transp.*, 44 N.C. App. 170, 260 S.E.2d 438 (1979), a case interpreting a remedial statute's grant of authority to an agency to reimburse expenses of persons displaced as a result of public works programs within its discretion, is instructive. The statute, N.C. Gen. Stat. § 133-8(a), provides: "Whenever the acquisition of real property for a program or project undertaken by an agency will result in the displacement of any person, such agency *may* make a payment to any displaced person, upon application as approved by the head of the agency . . . ." N.C. Gen. Stat. § 133-8(a) (1979) (emphasis added).[1] Our Court held:

> Quite plainly, [N.C. Gen. Stat. § 133-8] commit[s] the matter of relocation assistance payments absolutely and solely to the discretion of the officials of the agency involved. The use of the auxiliary verb "may" connotes "permission, possibility, probability or contingency", and, "[o]rdinarily, when a statute employs the word 'may,' its provisions will

1. This statute was subsequently amended by S.L. 2005-331, § 1, eff. Aug. 26, 2005, and now provides: "Whenever the acquisition of real property for a program or project undertaken by an agency will result in the displacement of any person, such agency *shall* make a payment to any displaced person, upon application as approved by the head of the agency." N.C. Gen. Stat. § 133-8 (2017) (emphasis added).

> be construed as permissive and not mandatory." We are of the opinion that [N.C. Gen. Stat.] § 133-8 confers no right either to receive such payments or to demand that the amount of payments, if granted, be calculated other than as the agency officials determine.

Henry, 44 N.C. App. at 172-73, 260 S.E.2d at 440 (citations omitted). Accordingly, our Court held the statute "creates neither right nor remedy pursuant to which plaintiff can press a claim against defendant. The statute bestows no more than a gift." *Id.* at 173, 260 S.E.2d at 440. Thus, under the pre-amended statute, the agency had complete discretion, without determining principles.

Similarly, here, we consider a remedial act that uses similar discretionary language, and provides that an agency "may" make a reimbursement. Additionally, Facility members do not have an automatic right of reimbursement for extra-contractual losses under the Facility Act; the only "right" of reimbursement a facility member has when it cedes a policy is the right to receive reimbursement from the Facility for contractual losses. *See* N.C. Gen. Stat. § 58-37-35(b). While respondent does not have a right to reimbursement, it does have a right to have its request considered. *See* N.C. Gen. Stat. § 58-37-35(g)(12) (authorizing the Board with discretionary authority to adopt rules such as Rule 5.C.2., as necessary to accomplish the purpose of the Facility).

Thus, Rule 5.C.2.'s clear provision that the Facility may exercise discretion over all petitions wherein the petitioner was not guilty of gross or willful or wanton mishandling of a claim is permissible, and distinct from *Sanchez*, a case involving a town's police powers related to planning and regulation of development.

Therefore, we reverse the superior court's judgment, which affirmed the Commissioner's order to the extent it is inconsistent with the plain reading of Rule 5.C.2., as discussed herein. Accordingly, we need not reach petitioner's contention that the Hearing Officer's erroneous interpretation of this statute exceeded his statutory authority.

We also do not reach the second issue on appeal. The superior court's affirming the Commissioner's determination that petitioner's grounds for the denial of Allstate's petition were not in accordance with the Facility Act, the Facility's Plan of Operation, and the Facility's Standard Practice Manual were made in light of its erroneous interpretation of Rule 5.C.2. Therefore, we remand to the superior court for further remand to the Commissioner for reconsideration consistent with this opinion.

III. Conclusion

For the foregoing reasons, we reverse the superior court's judgment and remand to that court for further remand to the Commissioner for reconsideration consistent with this opinion.

REVERSED AND REMANDED.

Judges TYSON and MURPHY concur.

GERALDINE PATTERSON, PLAINTIFF
v.
TAYLOR NICOLE WORLEY, DEFENDANT

No. COA18-977

Filed 4 June 2019

Negligence—contributory negligence—pedestrian crossing busy road—summary judgment

Where a pedestrian darted into a busy road and was immediately struck by a motorist, there was no genuine issue of material fact that defendant motorist owed any duty to yield to plaintiff pedestrian, that plaintiff's actions constituted contributory negligence, or that the last clear chance doctrine applied—therefore, summary judgment was properly granted to defendant motorist.

Appeal by plaintiff from judgment entered 5 June 2018 by Judge Phyllis M. Gorham in Wayne County Superior Court. Heard in the Court of Appeals 28 February 2019.

Everett, Womble & Lawrence, L.L.P., by Ronald T. Lawrence II and Kristy J. Jackson, for plaintiff-appellant.

Simpson Law, PLLC, by Caroline P. Stutts, for defendant-appellee.

BERGER, Judge.

Geraldine Patterson ("Plaintiff") appeals from the trial court's order granting summary judgment in favor of Taylor Nicole Worley ("Defendant"). Because Plaintiff was unable to show through pleadings, depositions, or other evidence that Defendant owed her a duty

recognized by North Carolina law, that her contributory negligence would not defeat her claim, or that the doctrine of last clear chance would apply, Defendant was entitled to judgment as a matter of law. We therefore affirm the order of the trial court granting summary judgment to Defendant.

Factual and Procedural Background

On March 28, 2017 at approximately 6:11 p.m., Plaintiff, a pedestrian, left her apartment and began walking eastbound on Spence Avenue towards the Wal-Mart shopping center located in Goldsboro, North Carolina. Defendant was returning home from work, driving northbound in her Lexus sedan. It was a bright, clear, sunny day, and Defendant was traveling approximately thirty-five miles per hour on Spence Avenue in Goldsboro. Spence Avenue is a five-lane road, with two lanes on each side, a turn lane in the middle, and a paved median.

As Plaintiff made her way towards Wal-Mart, she crossed the two southbound lanes of Spence Avenue, and then stopped at the paved median. A vehicle had entered the turning lane, but had come to a stop to allow Plaintiff to cross. In a northbound lane adjacent to the turning lane, a Ford Explorer had also come to a stop because of traffic backed up in its lane. Plaintiff stepped into the road in front of the Explorer and looked around the vehicle to see if the last lane of travel was clear. The Explorer driver blew its horn, and Plaintiff began running across the road. Plaintiff was then immediately hit by Defendant's car and injured.

Plaintiff filed her complaint on August 3, 2017, alleging Defendant had been negligent in the operation of her vehicle when she hit Plaintiff on Spence Avenue. Defendant responded September 21, 2017, alleging, *inter alia*, the affirmative defense of contributory negligence. On January 31, 2018, Defendant moved for summary judgment. After a May 29, 2018 hearing, Defendant's motion for summary judgment was granted by the trial court in a June 5 order. It is from this order that Plaintiff timely appeals.

Standard of Review

On a motion for summary judgment, our standard of review of the trial court's ruling is well-established:

> Under [the North Carolina Rules of Civil Procedure], Rule 56(a), summary judgment is properly entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

> that any party is entitled to a judgment as a matter of law. In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, and must be viewed in a light most favorable to the non-moving party. We review a trial court's order granting or denying summary judgment *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal. The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.

Blackmon v. Tri-Arc Food Sys., Inc., 246 N.C. App. 38, 41-42, 782 S.E.2d 741, 743-44 (2016) (*purgandum*).

Analysis

On appeal, Plaintiff argues that summary judgment was improperly granted because there remain genuine issues of material fact concerning Defendant's negligence, Plaintiff's contributory negligence, and the application of the last clear chance doctrine. We disagree.

> As our appellate courts have long recognized, negligence claims and allegations of contributory negligence should rarely be disposed of by summary judgment. This is because ordinarily it is the duty of the jury to apply the standard of care of a reasonably prudent person. Yet, summary judgment for defendant is proper where the evidence fails to establish negligence on the part of defendant, establishes contributory negligence on the part of plaintiff, or establishes that the alleged negligent conduct was not the proximate cause of the injury.

Sims v. Graystone Ophthalmology Assocs., P.A., 234 N.C. App. 65, 68, 757 S.E.2d 925, 927 (2014) (*purgandum*). Initially, a plaintiff bears

the burden of proving the essential elements of negligence: "that the defendant owed the plaintiff a legal duty, that the defendant breached that duty, and that the plaintiff's injury was proximately caused by the breach." *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002) (citation omitted). "Even if evidence of negligence is presented, plaintiff cannot prevail if the evidence reveals plaintiff was contributorily negligent." *Sims*, 234 N.C. App. at 68, 757 S.E.2d at 927.

Our General Statutes provide that "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway." N.C. Gen. Stat. § 20-174(a) (2017). "[P]edestrians have a duty to maintain a lookout when crossing an area where vehicles travel and a duty to exercise reasonable care for their own safety." *Corns v. Hall*, 112 N.C. App. 232, 237, 435 S.E.2d 88, 90 (1993).

> The mere fact that the pedestrian is oblivious to danger does not impose a duty on the motorist to yield the right of way. That duty arises when, and only when, the motorist sees, or in the exercise of reasonable care should see, that the pedestrian is not aware of the approaching danger and for that reason will continue to expose himself to peril.

Jenkins v. Thomas, 260 N.C. 768, 769, 133 S.E.2d 694, 696 (1963) (citations omitted). "Although a violation of [Section] 20-174(a) is not contributory negligence *per se*, a failure to yield the right-of-way to a motor vehicle may constitute contributory negligence as a matter of law." *Meadows v. Lawrence*, 75 N.C. App. 86, 89, 330 S.E.2d 47, 49 (1985) (citation omitted). It is for this reason that

> the court will nonsuit a plaintiff-pedestrian on the ground of contributory negligence when all the evidence so clearly establishes his failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible.
>
> The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury. It [is] plaintiff's duty to look for approaching traffic before she attempt[s] to cross the highway. Having started, it [is] her duty to keep a lookout for it as she crosse[s]. Having chosen to walk diagonally across a [multi-]lane highway, vigilance commensurate with the danger to which plaintiff [has] exposed herself [is] required of her.

Blake v. Mallard, 262 N.C. 62, 65, 136 S.E.2d 214, 216-17 (1964) (citations omitted).

Contributory negligence will not bar an award of damages for Plaintiff if she can prove that Defendant had the last clear chance to avoid the collision, but failed to take action. "The doctrine of last clear chance presupposes antecedent negligence on the part of the defendant and antecedent contributory negligence on the part of the plaintiff, such as would, but for the application of this doctrine, defeat recovery." *Clodfelter v. Carroll*, 261 N.C. 630, 634, 135 S.E.2d 636, 638 (1964).

> Where an injured pedestrian who has been guilty of contributory negligence invokes the last clear chance . . . doctrine against the driver of a motor vehicle which struck and injured him, he must establish these four elements: (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him.

Id. at 634-35, 135 S.E.2d at 639. "The doctrine contemplates a last 'clear' chance, not a last 'possible' chance, to avoid the accident; it must have been such a chance as would have enabled a reasonably prudent man in like position to have acted effectively." *Mathis v. Marlow*, 261 N.C. 636, 639, 135 S.E.2d 633, 635 (1964) (citation omitted). Last clear chance is "inapplicable where the injured party is at all times in control of the danger and simply chooses to take the risk." *Williams v. Odell*, 90 N.C. App. 699, 704, 370 S.E.2d 62, 66 (1988).

Here, no duty was imposed on Defendant requiring her to yield her right-of-way merely because Plaintiff was oblivious to her danger. Even if Defendant had been able to see Plaintiff coming across Spence Avenue, Defendant owed her no duty unless and until it became apparent that Plaintiff was "not aware of the approaching danger and for that

reason [was going to] continue to expose [her]self to peril." *Jenkins*, 260 N.C. at 769, 133 S.E.2d at 696. Defendant was driving thirty-five miles per hour and only saw Plaintiff "immediately" before the collision, and without "enough time to slow down or anything." The depositions of two witnesses, Dr. Diane Sutton and Ms. Samantha Lauderdale, support Defendant's memory of the collision. Dr. Sutton testified that Plaintiff had "simply darted out into the road" immediately in front of Defendant's sedan. Ms. Lauderdale confirmed this by testifying that Plaintiff had unexpectedly run out into the middle of the road as Defendant approached.

Plaintiff is not only unable to establish a duty owed her by Defendant, but the evidence also establishes a duty she owed Defendant. The evidence tends to show that Plaintiff was contributorily negligent when she "darted out into the road" and failed to yield the right-of-way, a duty she owed Defendant. When Plaintiff has an affirmative duty "to yield the right-of-way and all the evidence so clearly establishes the plaintiff-pedestrian's failure to yield the right-of-way as one of the proximate causes of [her] injuries that no other reasonable conclusion is possible, summary judgment should [be] entered in favor of the defendant." *Gaymon v. Barbee*, 52 N.C. App. 627, 628, 279 S.E.2d 91, 92 (1981).

Finally, the last clear chance doctrine is inapplicable here. Defendant did not have "such a chance as would have enabled a reasonably prudent man in like position to have acted effectively." *Mathis*, 261 N.C. at 639, 135 S.E.2d at 635 (citation omitted). Plaintiff was "at all times in control of the danger and simply [chose] to take the risk." *Williams*, 90 N.C. App. at 704, 370 S.E.2d at 66. On facts similar to those *sub judice*, our Supreme Court ruled in favor of a defendant-driver who had collided with a pedestrian. *McCullough v. Amoco Oil Co.*, 310 N.C. 452, 312 S.E.2d 417 (1984). In *McCullough v. Amoco Oil Co.*, the Court found that the defendant was entitled to summary judgment because the plaintiff could not contradict the testimony of the three eyewitnesses and the driver, who "could not have reasonably been expected to anticipate plaintiff's movement, thereby avoiding the accident." *Id.* at 459, 312 S.E.2d at 421.

Such is the case here. Defendant could not see Plaintiff, or therefore predict Plaintiff's movement, because, just before she darted into the street, she was standing out of view in front of the Ford Explorer. "Assuming [Defendant]'s negligence *arguendo* and [P]laintiff's contributory negligence as shown by the affidavits and deposition[s], there has been no forecast of evidence of a last clear chance on the part of the [Defendant] to avoid the collision." *Id.*

Conclusion

Because there is no genuine issue of material fact as to Defendant's negligence, Plaintiff's contributory negligence, or whether the last clear chance doctrine would apply, the trial court did not err in granting summary judgment in favor of Defendant.

AFFIRMED.

Judges ZACHARY and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
TIMOTHY CALVIN DENTON, DEFENDANT

No. COA18-742

Filed 4 June 2019

Evidence—lay opinion—accident reconstruction—expert unable to form opinion

In a felony death by vehicle prosecution, in which defendant and the alleged victim were both thrown from the vehicle, the trial court abused its discretion by admitting lay opinion testimony identifying defendant as the driver where the expert accident reconstruction analyst was unable to form an expert opinion based on the same information available to the lay witness. The error was not harmless because the identity of the driver was the only issue in serious contention at trial.

Appeal by defendant from judgment entered on or about 22 September 2017 by Judge Mark E. Powell in Superior Court, Madison County. Heard in the Court of Appeals 13 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

STROUD, Judge.

Defendant appeals his conviction for felony death by vehicle. The trial court erred by admitting lay opinion testimony identifying defendant as the driver of the vehicle at the time of an accident in which an occupant of the car was killed where the expert accident reconstruction analyst was unable to form an expert opinion based upon the same information available to the lay witness. We therefore reverse defendant's conviction and grant defendant a new trial.

I. Background

On 1 August 2014, defendant and Danielle Mitchell were both in a car when it ran off the road and wrecked; both were ejected from the car and Ms. Mitchell died at the scene from her injuries. Defendant was indicted for felony death by vehicle. The primary factual issue at trial was whether defendant was driving at the time of the accident.

The State's evidence showed that on the morning of 1 August 2014, defendant and Ms. Mitchell decided to go to Asheville to find some "[w]hite lightning" liquor in a "[k]ind of an old and red, burgundy looking" car that "might've been a Dodge" that defendant drove. Defendant and Ms. Mitchell spent time together often during the year preceding the wreck, either at her home or the home of Ms. Mitchell's father, Mr. Daniel Seay, where they would "hang out, talk . . . drink, smoke, watch football games, baseball games." Ms. Mitchell and her father lived about a quarter of a mile from each other, and defendant's understanding was that Ms. Mitchell did not have her own car.

On 1 August 2014, defendant and Ms. Mitchell left before lunch and defendant was driving as they left Mr. Seay's house, and Mr. Seay testified that he had "never seen nobody else ever drive [defendant's] car." Mr. Seay recalled that "[defendant] wouldn't let nobody behind the wheel of that car[,]" and "[t]here was a few times that he, he had to move to let somebody out, and he would always move the car. Nobody touched his car." Mr. Seay testified that his daughter, Ms. Mitchell, had ridden in the car before but she always sat in the front passenger seat.

Shortly before 10:00 p.m. that evening, defendant and Ms. Mitchell called Mr. Seay from a gas station and told him that the car was overheating. Defendant told Mr. Seay, "She's flipping out," and reassured Mr. Seay they were all right and would "be there in a few minutes." Shortly thereafter, Mr. Seay heard sirens close to the house. Around 10:10 p.m., Trooper Jason Fox of the North Carolina State Highway Patrol received a dispatch call regarding a vehicle crash at US 25-70 near the Brush Creek area. After arriving at 10:22 p.m., Trooper Fox spoke with EMS

who advised that two occupants had been ejected from the vehicle. One of the occupants, later identified as Ms. Mitchell, was already deceased. Defendant suffered from a severe head injury in the accident and had no memory of what happened on the day of the accident.

Defendant was also seriously injured, and EMS called for a helicopter to transport him to the hospital. EMS stabilized defendant's neck in a "C" collar and placed him on a backboard. While EMS was working with defendant, he was screaming, hyperventilating, and combative; he was ultimately sedated for flight.

Since the crash resulted in a fatality, Trooper Fox notified his supervisor. Trooper Fox also found a witness to the wreck, Mr. David Martin. Mr. Martin reported that he was traveling on the highway toward Hot Springs when an "orange-ish, reddish" car came up behind him "extremely fast" such that Mr. Martin "did not see it coming before it was basically on top of [him]." Mr. Martin estimated that the car was traveling twice as fast as he was. The car passed Mr. Martin on the left side in a no-passing zone, "started . . . a left turn and . . . ran off the right side of the road, and when it did, dust and rocks and stuff started flying." At that point, Mr. Martin saw "just headlights and taillights. Looked like [the car] was rolling, flipping." Mr. Martin stopped immediately to help and call 911. Mr. Martin saw a woman, apparently deceased, and a man further up the road, moving a little but incoherent.

Troopers Sorrells and Carver, along with First Sergeant Bray, went to the scene to assist Trooper Fox with his investigation and completion of the field sketch. Trooper Fox took photographs of the scene. The vehicle involved in the crash, a red or burgundy 2001 Dodge Neon registered to defendant's mother, was off the left shoulder of the roadway facing towards Hot Springs. Trooper Fox found a sealed beer bottle by Ms. Mitchell's body, a Miller Highlife can and an empty Corona box in the debris path, and Corona beer bottle caps inside the vehicle and near Ms. Mitchell's body. Trooper Fox believed the crash involved alcohol use because of "the bottle caps located in the vehicle, the still-closed beer bottle that was located in the debris path . . . there was a strong odor of alcohol coming from the vehicle itself." Based upon a blood test from the hospital, Defendant's blood alcohol level was .182, and benzodiazepine and cannabinoid were present in his urine.

Trooper Fox determined that the Neon had been traveling north at a high rate of speed in a forty-five mile per hour zone, lost control and ran off the right shoulder of the roadway, struck a road sign, proceeded into a ditch and struck a rock which caused it to overturn and roll four

or five times, traveled across the highway and back off the other side, and came to rest on all four wheels after striking a small block building. Neither defendant nor Ms. Mitchell had been wearing a seatbelt prior to being ejected, as each seatbelt was in a locked position near the respective door frames. The airbags did not deploy. Long strands of "brown[] or dark colored" hair were trapped in the passenger side of the vehicle and in windshield glass. Ms. Mitchell's hair was dark brown.

Trooper Fox measured the distance from the front edge of the driver's seat to the acceletor pedal as 1 foot 9 inches; from the back of the driver's seat to the pedal as 3 feet 6 inches; and from the top edge of the driver's seat to the center of the steering wheel as 2 feet 8 inches. Defendant is 5'11" tall according to the DMV database, and Ms. Mitchell was measured at approximately 5'2" by the medical examiner. Over defendant's objection, Trooper Fox testified he believed defendant was driving at the time of the crash because "the seating position was pushed back to a position where I did not feel that Ms. Mitchell would be able to operate that vehicle or reach the pedals."

But Trooper Fox acknowledged that he was not an expert in accident reconstruction, although one was called to the investigation. Trooper Daniel Souther of the North Carolina Highway Patrol was the accident reconstruction expert who analyzed the accident. He could not reach a conclusive expert opinion about who was driving at the time of the accident, although he had three different theories of how the accident happened, one of which he deemed the most plausible in which defendant was the driver.

Trooper Souther testified "the only way it makes sense to me is that Theory 1" in which defendant was the driver of the vehicle, but Trooper Souther clarified "I'm not saying 100 percent this is right, but this makes the most sense to me[,]" and ultimately he testified that he could not "conclusively state [defendant] was operating th[e] vehicle." Later Trooper Souther was asked, "And so you are telling us that as an expert in the field of accident reconstruction you do not have an opinion satisfactory to yourself within any reasonable degree of certainty as to who was driving this car on August 1st, 2014?" to which he responded, "Not [that] I can prove." Ultimately, defendant was found guilty by a jury, sentenced accordingly, and now appeals.

II. Opinion Testimony

Defendant's only argument on appeal is that "the trial court erred by overruling defendant's objections to testimony from State Trooper Jason Fox, who admittedly was not an expert, that it was his opinion that

defendant . . . was driving the car at the time of the collision." (Original in all caps.) "[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000). The trial court abused its discretion in allowing Trooper Fox to testify, over defendant's objections, to his opinion as to who was driving the vehicle. *See, e.g.*, *Shaw v. Sylvester*, 253 N.C. 176, 179–80, 116 S.E.2d 351, 354–55 (1960).

North Carolina Rule of Evidence 701 provides that

> [i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2017).

> Opinion evidence is generally inadmissible whenever the witness can relate the facts so that the jury will have an adequate understanding of them and the jury is as well qualified as the witness to draw inferences and conclusions from the facts. If either of these conditions is absent, the evidence is admissible.
>
> Although a lay witness is usually restricted to facts within his knowledge, if by reason of opportunities for observation he is in a position to judge of the facts more accurately than those who have not had such opportunities, his testimony will not be excluded on the ground that it is a mere expression of opinion.

State v. Lindley, 286 N.C. 255, 257–58, 210 S.E.2d 207, 209 (1974) (citations and quotaiton marks omitted).

Accident reconstruction analysis requires expert opinion testimony; we can find no instance of *lay* accident reconstruction analysis testimony in North Carolina. *See State v. Maready*, 205 N.C. App. 1, 17, 695 S.E.2d 771, 782 (2010) ("Accident reconstruction opinion testimony may only be admitted by experts, who have proven to the trial court's satisfaction that they have a superior ability to form conclusions based upon the evidence gathered from the scene of the accident than does the jury."). Accident reconstruction by its very nature requires expert analysis of the information collected from the scene of the accident and falls under Rule of Evidence 702,

> Subsection (a)(1) of Rule 702 calls for a quantitative rather than qualitative analysis. That is, the requirement that expert opinions be supported by sufficient facts or data means that the expert considered sufficient data to employ the methodology.
>
> Consequently, as a general rule, questions relating to the bases and sources of an expert's opinion affect only the weight to be assigned that opinion rather than its admissibility. In other words, this Court does not examine whether the facts obtained by the witness are themselves reliable-whether the facts used are qualitatively reliable is a question of the weight to be given the opinion by the factfinder, not the admissibility of the opinion.
>
> Additionally, experts may rely on data and other information supplied by third parties even if the data were prepared for litigation by an interested party. Unless the expert's opinion is too speculative, it should not be rejected as unreliable merely because the expert relied on the reports of others. An expert may rely on deposition statements made by other witnesses in developing the factual basis of his opinion.

Pope v. Bridge Broom, Inc., 240 N.C. App. 365, 374, 770 S.E.2d 702, 710 (2015) (citations, quotation marks, ellipses, and brackets omitted).

Trooper Fox was not a witness to the accident; he assisted in collecting the measurements and information regarding the scene used by the accident reconstruction expert, Trooper Souther, to try to determine who was driving the car. Although he had three theories of who was driving the vehicle, Trooper Souther admitted he did not have the necessary information to come to an expert opinion to a sufficient degree of certainty and he could not identify the driver of the car. Trooper Fox was basing his lay opinion upon the very same information used by Trooper Souther, but without the benefit of expert analysis.

This case is similar to *Shaw* in that the facts about the accident and measurements available were simply not sufficient to support an expert opinion — as Trooper Souther testified — and lay opinion testimony on this issue is not admissible under Rule 701. *See Shaw v. Sylvester*, 253 N.C. 176, 179–80, 116 S.E.2d 351, 354–55 (1960). As explained in *Shaw*,

> The known facts in this case leave too many unknowns and imponderables to permit anyone to say with any degree of certainty who was the driver. This

> case furnishes a good illustration why courts look with disfavor upon attempts to reconstruct traffic accidents by means of expert testimony, owing to the impossibility of establishing with certainty the many factors that must be taken into consideration.
>
> As a general rule, a witness must confine his evidence to the facts. . . . The jury is just as well qualified as the witnesses to determine what inferences the facts will permit or require.
>
> The qualified expert, the nonobserver, may give an opinion in answer to a proper hypothetical question in matters involving science, art, skill and the like. The plaintiff contends Sgt. Etherage placed himself in this expert category by having investigated more than 400 wrecks. There is no evidence that wrecks follow any set or fixed pattern. An automobile, like any other moving object, follows the laws of physics; but which door came open first during the movement would depend upon the amount and direction of the physical forces applied, and the place of their application. There was no evidence the witness ever investigated an accident when both doors were open and both occupants thrown out. In this case neither the nonobserver nor the jury could tell who was the driver.
>
> The ruling of the trial court that Sgt. Etherage was not qualified to testify that Becker was thrown through the left door and, therefore, was the driver is in accordance with our decisions. The evidence at the trial was insufficient to raise a jury question.

Id. at 179–80, 116 S.E.2d at 354–55 (citations and quotation marks omitted); *see also Maready*, 205 N.C. App. at 17, 695 S.E.2d at 782 ("We hold that the admission of the officers' opinion testimony concerning their purported accident reconstruction conclusions was error. Accident reconstruction opinion testimony may only be admitted by experts, who have proven to the trial court's satisfaction that they have a superior ability to form conclusions based upon the evidence gathered from the scene of the accident than does the jury."); *State v. Wells*, 52 N.C. App. 311, 314, 278 S.E.2d 527, 529 (1981) ("Our State Supreme Court has held in several cases that while it is competent for an investigating officer to testify as to the condition and position of the vehicles and other physical facts observed by him at the scene of an accident, his testimony as to his conclusions from those facts is incompetent. A case

almost directly on point is *Cheek v. Barnwell Warehouse and Brokerage Co.*, 209 N.C. 569, 183 S.E. 729 (1936). In that case the Supreme Court upheld the trial court's exclusion of opinion testimony by a nonexpert witness as to where a collision occurred based upon his examination of the scene sometime after the accident on the ground that its admission would invade the province of the jury. In the present case, the most crucial question for the jury on the manslaughter charge was whether defendant caused the collision which resulted in decedent's death by crossing the center line into decedent's lane of travel. By testifying that his investigation revealed the point of impact between the two cars to be in decedent's lane of travel, Trooper Parks stated an opinion or conclusion which invaded the province of the jury." (citations omitted)).

The State's brief addresses the general law on opinion testimony and cites to only *State v. Ray*, 149 N.C. App. 137, 560 S.E.2d 211 (2002), *aff'd per curiam*, 356 N.C. 665, 576 S.E.2d 327 (2003), and an unpublished case to support its argument on appeal. An unpublished opinion "does not constitute controlling legal authority[,]" and we need not address it because other cases do address the issues presented here. N.C.R. App. P. 30(e)(3). *Ray* does not support the State's argument, since there was expert testimony to the same opinion as presented by the lay witness, and the court assumed that "[e]ven if inclusion of [the lay opinion testimony] was erroneous" it was harmless based upon the expert testimony. 149 N.C. App. at 145, 560 S.E.2d at 217. In *Ray*, defendant argued

> the trial court erred in overruling his objection to Detective Hendricks' opinion testimony that the lacerations on Harrington's hand were not consistent with a traffic accident, because Detective Hendricks was not qualified as a medical expert under Rule 702 of the North Carolina Rules of Evidence. The State, however, did not tender Detective Hendricks as an expert witness. Detective Hendricks offered a lay witness opinion based on his personal observations at the scene and his investigative training background as a police officer. *See* N.C. Gen. Stat. § 8C-1, Rule 701 (1999) (lay witness may testify as to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue). Even if inclusion of Detective Hendricks' opinion testimony was erroneous, it would be harmless error in light of Dr. Butts' expert testimony that the lacerations on Harrington's hand were consistent with defensive wounds

> and could have been caused by the utility knife. Thus, the trial court properly overruled defendant's objection to Detective Hendricks' testimony.

Id.

The circumstances of this case are basically the opposite of *Ray* because in *Ray* the expert opinion confirmed the testimony of the lay witness, rendering any potential error harmless; here, the expert was unable to form an opinion. *See id.* For the same reason, we cannot agree with the State's contention that Trooper Fox's testimony was harmless. Trooper Souther was the expert in accident reconstruction and while he believed that his theory which placed defendant as the driver made the "most sense[,]" he admitted this case was very challenging and he simply did not have sufficient information regarding the many variables involved to come to a conclusive determination.

Trooper Fox was in no better position than the jury to consider the evidence the State directs us to indicating defendant was the driver, including witness testimony that the car was owned by defendant's mother and only defendant drove that vehicle, the location of Ms. Mitchell's hair in the glass, and the position of the driver's seat. *See Wells*, 52 N.C. App. at 314, 278 S.E.2d at 529. The State's expert accident reconstruction analyst could not testify to a reasonable degree of certainty as to an opinion of who was driving. The only issue in serious contention at trial was who was driving the car; if Ms. Mitchell was driving, defendant could not be guilty. If defendant was driving, the evidence regarding speeding, reckless driving, alcohol consumption, defendant's high blood alcohol level, and evidence of other impairing substances in his blood at the time of the accident would essentially guarantee a guilty verdict. In this context, Trooper Fox's opinion testimony was not harmless. Therefore, defendant must receive a new trial. We also note that the State filed a motion for appropriate relief or alternatively a petition for a writ of certiorari asking us to review defendant's sentence, but because we are granting defendant a new trial, we need not address this issue.

III. Conclusion

We conclude defendant must receive a new trial.

NEW TRIAL.

Judges INMAN and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
KEVIN JAMES GAMBRELL, DEFENDANT

No. COA18-900

Filed 4 June 2019

Satellite-Based Monitoring—lifetime monitoring—as-applied challenge—reasonableness—sufficiency of evidence

On appeal from an order requiring defendant to submit to satellite-based monitoring (SBM) for the rest of his natural life, the Court of Appeals was bound to follow *State v. Griffin*, 260 N.C. App. 629 (2018), and hold that the State failed to meet its burden of showing the reasonableness of the SBM program as applied to defendant by failing to produce evidence—other than evidence that SBM would track defendant's movements—to show the efficacy of SBM in general, such as empirical studies or expert testimony. The State may not rely on the assumption that an offender would be less likely to reoffend if he knew he was being tracked by SBM.

Appeal by Defendant from order entered 7 February 2018 by Judge Joseph Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 10 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for the Defendant.

DILLON, Judge.

Defendant Kevin James Gambrell appeals from an order requiring him to submit to satellite-based monitoring ("SBM") for the rest of his natural life.

I. Background

Defendant was charged with and pleaded guilty to taking indecent liberties with a child. Defendant was sentenced in the presumptive range. The State also sought to have Defendant register as a sex-offender and to enroll in SBM. Defendant motioned to dismiss the State's petition for SBM and to declare such program unconstitutional. The trial court

denied Defendant's motion to dismiss and, in turn, ordered him to submit to SBM for the rest of his natural life. Defendant timely appealed.

II. Analysis

In his appeal, Defendant argues that the State's SBM program is both unreasonable as applied to him and facially unconstitutional. We review a trial court's determination that SBM is reasonable *de novo*. *State v. Bare*, 197 N.C. App. 461, 464, 677 S.E.2d 518, 522 (2009), *disc. review denied*, 364 N.C. 436, 702 S.E.2d 492 (2010). We also review alleged constitutional violations *de novo*. *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001).

The United States Supreme Court has determined that the monitoring of an individual under North Carolina's SBM program constitutes a continuous warrantless search of that individual. *Grady v. North Carolina*, ___ U.S. ___, ___, 135 S. Ct. 1368, 1371 (2015). That Court did not state that monitoring an individual under the program was *per se* unconstitutional, recognizing that "the Fourth Amendment prohibits only *unreasonable* searches." *Id.* (emphasis in original). Rather, that Court stated that whether the enrollment of a particular individual for monitoring under the program constitutes a reasonable search "depends on the *totality of the circumstances*, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* (emphasis added).

The "totality of the circumstances" calculus includes whether the sexual offender poses a threat to reoffend. The calculus also includes whether an SBM search would be effective in furthering the State interest in deterring the offender from reoffending. *See State v. Bowditch*, 364 N.C. 335, 351, 700 S.E.2d 1, 12 (2010) ("The SBM program is concerned with protecting the public against recidivist tendencies of convicted sex offenders.").

In the present case, Defendant motioned to dismiss the State's petition to enroll him in SBM. A hearing was held on Defendant's motion. At the hearing, the only evidence presented by the State was testimony from a probation officer regarding Defendant's criminal record and the logistics and procedure of SBM, namely that SBM would track the movement of Defendant. While Defendant's status as a recidivist was not disputed, Defendant argued that the State failed to meet its burden to show that SBM was a reasonable method to reduce recidivism in his case.

Indeed, preventing recidivism among sex offenders is a government interest. And while SBM is not 100% reliable to prevent recidivism, it

certainly acts as a deterrent to further criminal conduct. *See Bowditch*, 364 N.C. at 351, 700 S.E.2d at 12 (acknowledging that the SBM program does not prevent crime but does act as a deterrent); *Bare*, 197 N.C. App. at 476, 677 S.E.2d at 519 (stating that "SBM could have a deterrent effect. Presumably, sex offenders would be less likely to repeat offenses since they would be aware their location could be tracked and it would be easier to catch them.").

Thus, it could be argued that the probation officer's testimony that SBM would track the movements of Defendant constituted *some* evidence that Defendant would be less likely to reoffend or to go where he should not go, since he would know that his movements were being tracked. It follows that a trial judge, making a reasonableness determination, may not need further evidence, such as empirical data or expert testimony, in a particular case to conclude that SBM would be reasonable, based on the totality of the circumstances. Indeed, we have found such deterrents, like traffic checkpoints, reasonable without the aid of expert testimony, determining that a checkpoint "deter[s] driver's license violations" and that this "deterrence goal was a reasonable one." *State v. Jarrett*, 203 N.C. App. 675, 679-80, 692 S.E.2d 420, 425 (2010) (internal citations omitted).

However, our Court has recently held that to show the efficacy of SBM in deterring recidivism, the State may never rely on an assumption that an offender would be less likely to reoffend if he knew he was being watched: the State must produce other evidence to show the efficacy of SBM in general, *e.g.*, empirical studies or expert testimony. *See State v. Griffin*, ___ N.C. App. ___, ___, 818 S.E.2d 336, 340-42 (2018). In *Griffin*, the panel relied on the decision of our Court in *Grady* handed down after the matter had been remanded from the United States Supreme Court, *see State v. Grady*, ___ N.C. App. ___, 817 S.E.2d 18 (2018), and on the reasoning of a Fourth Circuit Court of Appeals opinion analyzing the constitutionality of an order restricting the travel of a sex offender, *see Doe v. Cooper*, 842 F.3d 833, 846-47 (4th Cir. 2016). While *Griffin* and some of its progeny are currently before our Supreme Court, the *mandates* of those cases have not been stayed by that Court. We are, therefore, compelled to continue following *Griffin*. Accordingly, we conclude that the State failed to meet its burden of showing the reasonableness of the SBM program in this case by failing to produce separate evidence concerning the efficacy of the SBM program.

We note that Defendant also facially challenges the constitutionality of the SBM program. However, as we have concluded that the order

requiring Defendant to submit to SBM was unreasonable as applied to him, we decline to address this argument.

III. Conclusion

As the State failed to prove the reasonableness of the SBM program as applied to Defendant, we reverse the order requiring him to submit to SBM for the remainder of his natural life.

REVERSED.

Judges MURPHY and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
REGINALD LEE JONES, DEFENDANT

No. COA18-748

Filed 4 June 2019

1. Firearms and Other Weapons—discharging a firearm into an occupied dwelling—jury verdict conflating "dwelling" with "property"—charge referring to "property" as victim's "house"

The trial court's judgment finding defendant guilty of Class D discharging a firearm into an occupied *dwelling* was consistent with the jury verdict finding him guilty of "felonious discharging a firearm into an occupied *property*" where the indictment put defendant on notice that the State sought the Class D offense and the trial court's jury charge exclusively and repeatedly referred to the "occupied property" as the victim's "house," which is synonymous with "dwelling."

2. Indictment and Information—incorrect statutory reference—surplusage

An indictment was not fatally flawed where it charged defendant with discharging a firearm into an occupied dwelling (N.C.G.S. § 14-34.1(b)) but also referred to N.C.G.S. § 14-34.1(c) (discharging a firearm into an occupied dwelling *causing serious bodily injury*) as the statute that was violated—yet did not allege any injury. The body of defendant's indictment clearly identified the crime being

charged, and the statutory reference was surplusage that could be disregarded.

3. Firearms and Other Weapons—discharging a firearm into an occupied dwelling—knowledge or reasonable grounds to believe dwelling was occupied—sufficiency of evidence

The State presented substantial evidence that defendant knew or had reasonable grounds to believe he was discharging his firearm into an occupied property where a witness testified that defendant had loudly "called out" the people inside the house, challenging them to come outside, before he fired at the house. Further, the homeowner had been standing in the doorway speaking with the witness just a few minutes before the shooting, when defendant drove slowly past, looking at the house.

4. Assault—multiple charges—sufficiency of evidence—two uninterrupted shots

Invoking Appellate Rule 2 to prevent manifest injustice, the Court of Appeals agreed with defendant's unpreserved argument that the evidence at trial supported only one—not two—assault charges, where defendant raised his gun and fired two shots in rapid succession, without interruption.

Appeal by Defendant from judgment entered 22 March 2018 by Judge Ebern T. Watson III in Onslow County Superior Court. Heard in the Court of Appeals 16 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Oliver G. Wheeler, IV, for the State.

The Epstein Law Firm, PLLC, by Drew Nelson, for defendant-appellant.

MURPHY, Judge.

Defendant argues the trial court erred in three ways regarding his prosecution and conviction for discharging a weapon into an occupied dwelling, but fails to show that the trial court erred (1) in entering its judgment against him for that offense, (2) proceeding based on the State's indictment, or (3) in failing to dismiss the charge for insufficient evidence. We find no error in the trial court's decisions relating to these three issues.

However, although not properly preserved for appeal, we invoke Rule 2 of our Rules of Appellate Procedure in order to prevent manifest injustice and vacate Defendant's conviction for assault by pointing a gun.

BACKGROUND

Defendant, Reginald Lee Jones, was found guilty of (1) discharging a firearm into an occupied dwelling, (2) assault with a deadly weapon, and (3) assault by pointing a gun. In a separate judgment, Defendant was found guilty of fleeing to elude arrest, but does not appeal any issues related thereto. The charges stem from an incident where Defendant fired multiple gunshots in the direction of an individual and his house.

On the evening of 6 July 2014, Defendant was seen slowly driving by and looking at a residence in Onslow County. Eventually, Defendant got out of his car and started yelling at an individual standing near the residence, "Teekay," and "calling out" the individuals inside the house, challenging them to come outside. The exchange escalated to the point where Defendant pulled out a handgun and fired two shots at Teekay. At least one of the two shots went into the exterior wall of the house, at which point the homeowner, Antonio Holley ("Holley"), went to the doorway and yelled that Defendant "ain't doing nothing" but firing shots into the air. Defendant responded by firing two shots at Holley, who was still standing in the doorway of his house, one of which hit him in the arm. Shortly thereafter, a second man inside the house returned fire in Defendant's direction, and Defendant drove away. Upon investigating the scene, police noted damage to Holley's house and the surrounding area.

Defendant was indicted by a Grand Jury for (1) littering, (2) fleeing to elude arrest with a motor vehicle, (3) assault with a deadly weapon with the intent to kill inflicting serious injury, (4) assault by intentionally pointing a gun at a person without legal justification, and (5) discharging a firearm into an occupied dwelling. At trial, the State abandoned the littering charge. The jury returned guilty verdicts on the charges of fleeing to elude arrest, assault with a deadly weapon, assault by pointing a gun, and discharging a firearm into an occupied dwelling, and the trial court entered judgment accordingly. Defendant timely appeals and presents four arguments for our consideration.

ANALYSIS

A. The Trial Court's Judgment

[1] Defendant first argues the trial court's judgment finding him guilty of Class D discharging a firearm into an occupied dwelling is inconsistent

with the jury verdict finding him guilty of "felonious discharging a firearm into an occupied *property*."

N.C.G.S. § 14-34.1 sets out three levels of felony offense for "Discharging certain barreled weapons or a firearm into occupied property." N.C.G.S. § 14-34.1 (2017). It is a Class C felony to discharge a firearm into an occupied property where "the violation results in serious bodily injury to any person," a Class D felony where the weapon is discharged "into an occupied dwelling," and a Class E felony where the weapon is discharged "into any building, structure, vehicle, aircraft, [etc.]" *Id.* Defendant argues the jury only found him guilty of the Class E offense, so the trial court erred by entering judgment for the Class D offense under N.C.G.S. § 14-34.1. The record indicates otherwise.

Defendant was indicted for discharging "a firearm into an occupied dwelling, a building, . . . while it was actually occupied by [Holley] and [another man]." As such, Defendant was on notice from the commencement of this case that the State sought the Class D offense. On the indictment form, the State listed N.C.G.S. § 14-34.1(c) as the statute Defendant allegedly violated, but chose to abandon the "serious bodily injury" portion before charging the jury. After doing so, the State told the trial court it "should be able to proceed on the [charge of] discharging a weapon into an occupied *property or dwelling*." The trial court agreed and used the State's imprecise language, conflating property with dwelling, throughout the remainder of Defendant's trial.

During the jury charge, the trial court instructed, "[D]efendant has been charged with discharging a firearm into occupied property." However, the trial court went on to describe that property exclusively and repeatedly as Holley's "house[:]"

> The defendant has been charged with discharging a firearm into occupied property. For you to find the defendant guilty of this offense, the state must prove three things, beyond a reasonable doubt. First, that the defendant willfully or wantonly discharged a firearm into a *house* at [Holley's address]. . . . Second, that [Holley's] *house* . . . was occupied by one or more persons at the time that the firearm was discharged. Third, that the defendant knew that [Holley's] *house* . . . was occupied by one or more persons.

Based on that instruction, when the jury found Defendant guilty of "discharging a firearm into an occupied property[,]" the property to which they referred was Holley's "house" described throughout their instruction.

We have previously held that "dwelling" under N.C.G.S. § 14-34.1(b) is synonymous with "apartment," *State v. Bryant*, 244 N.C. App. 102, 107-08, 779 S.E.2d 508, 512-13 (2015), and "residence." *State v. Curry*, 203 N.C. App. 375, 382, 692 S.E.2d 129, 136 (2010). Similarly, Black's Law Dictionary defines "house" as "[a] dwelling;" and the word "dwelling" is itself shorthand for "dwelling-house." Black's Law Dictionary (9th ed. 2009). Furthermore, in *Curry* we held a verdict sheet finding the defendant "guilty of discharging a firearm into occupied property" —the same as the verdict sheet here—was a sufficient basis for the trial court to enter judgment for the Class D offense under N.C.G.S. § 14-34.1(b). *Curry*, 203 N.C. App. at 382-83, 692 S.E.2d at 136. The trial court's judgment sentencing Defendant for the Class D felony of discharging a firearm into an occupied dwelling is consistent with the record and the jury's guilty verdict.

B. Indictment

[2] Defendant next argues we "should arrest the judgment against [Defendant] for discharging a weapon into an occupied dwelling due to a fatal defect in the indictment." Defendant argues the indictment was fatally flawed because it charged him with discharging a weapon into occupied property causing serious bodily injury, but "failed to allege that any injury resulted from the discharging of the firearm into the occupied property." We disagree.

Defendant's argument is based on the indictment's reference to "[N.C.G.S. §] 14-34.1(c)" as being the violated statute. However, we have previously held that the statutory reference on an indictment "is surplusage and can be disregarded." *State v. Jones*, 110 N.C. App. 289, 292, 429 S.E.2d 410, 412 (1993). The body of Defendant's indictment charges him, in relevant part, with "unlawfully, willfully, and feloniously [discharging] . . . a firearm into an occupied dwelling . . . ." "[I]t is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). Here, Defendant's indictment clearly identifies the crime being charged. Furthermore, as was the case in *Jones*, "Defendant cannot complain that [he] was unaware of the acts for which [he] was charged and if anything . . . benefited by the State's decision to proceed [under N.C.G.S. § 14-34.1(b)] because it reduced [his] level of punishment from a Class C to a Class D felony." *Jones*, 110 N.C. App. at 292, 429 S.E.2d at 413. The indictment was not fatally defective, and we need not arrest judgment.

C. Dismissal for Insufficient Evidence

1. Discharging a Firearm into an Occupied Dwelling

[3] Defendant's third argument is that the trial court "erred by failing to dismiss the charge of discharging a weapon into an occupied property." Specifically, Defendant argues the State "failed to demonstrate that [Defendant] knew the property was occupied when he fired the first two shots" into Holley's house and that the charge should have been dismissed for insufficient evidence.

"When reviewing a sufficiency of the evidence claim, this Court considers whether the evidence, taken in the light most favorable to the [S]tate and allowing every reasonable inference to be drawn therefrom, constitutes substantial evidence of each element of the crime charged." *State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 261 (2008) (internal quotation marks omitted). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

One is guilty of felony discharging a firearm into an occupied dwelling where he intentionally discharges a firearm into a building that he knows, or "has reasonable grounds to believe," is occupied by one or more persons. *State v. Williams*, 284 N.C. 67, 73, 199 S.E.2d 409, 412 (1973). Eyewitness Gary John ("John") testified that, before discharging his firearm, Defendant stepped out of his car and loudly "called out" the individuals inside Holley's house, challenging them to come outside. John had been standing in the doorway of Holley's house and speaking with Holley just a few minutes earlier when Defendant slowly drove past, looking at the dwelling. Viewed in the light most favorable to the State, a reasonable mind might certainly accept the above evidence as adequate to support the conclusion that Defendant knowingly discharged a firearm into a dwelling he knew to be occupied.

Substantial evidence indicates Defendant intentionally discharged a firearm into a dwelling he knew or had reasonable grounds to believe was occupied at the time, and the trial court did not err in declining to dismiss this charge for insufficient evidence.

2. Assault by Pointing a Gun

[4] In his final argument on appeal, Defendant contends the trial court erred in failing to dismiss one of the assault charges against him because the evidence presented at trial "supported only a single assault charge." At trial, Defendant's counsel never moved to dismiss the assault charges against him, which renders this argument unpreserved for appellate

review. N.C. R. App. P. 10(a)(1) (2019). Nevertheless, Defendant argues we should invoke Rule 2 to reach this error and "prevent manifest injustice."

In urging us to invoke Rule 2, Defendant argues he could not properly be charged for two separate assaults on Holley—one by pointing a gun and the other with a deadly weapon (as a result of the gunshots)—based on the evidence presented at trial. These charges are related but distinct, and Defendant was indeed convicted of both based upon his actions directed toward Holley.

After careful review of the record, we agree with Defendant's contention that the only evidence regarding the two alleged assaults came from John's testimony that, "the victim . . . Holley, comes out yelling, 'You ain't doing nothing. You're just shooting in the air.' That was—the reaction from that was two more bam bams, quick double taps, from the shooter." This testimony is the sole evidence for Defendant's two assault convictions. The State does not argue otherwise, or point us to any other facts from which a reasonable mind might infer Defendant assaulted Holley. We invoke Rule 2 in order to reach this issue and prevent manifest injustice to Defendant.

We have held, "In order for a defendant to be charged with multiple counts of assault, there must be multiple assaults. This requires evidence of a distinct interruption in the original assault followed by a second assault." *State v. Maddox*, 159 N.C. App. 127, 132-33, 583 S.E.2d 601, 604-05 (2003) (internal citation and quotation marks omitted) (declining to find multiple distinct assaults where the evidence "indicate[d] that all five shots were fired in rapid succession"); *see also State v. Brooks*, 138 N.C. App. 185, 190, 530 S.E.2d 849, 852-53 (2000) (allowing only one assault charge where three gunshots were fired almost simultaneously). "The elements of the offense of assault by pointing a gun are: (1) pointing a gun at a person; (2) without legal justification." *State v. Dickens*, 162 N.C. App. 632, 638, 592 S.E.2d 567, 572 (2004); *see* N.C.G.S. § 14-34 (2017). "The elements of the offense of assault with a deadly weapon are: (1) an assault of a person; (2) with a deadly weapon." *Id.*; *see* N.C.G.S. § 14-33(c)(1) (2017). An individual could be charged with both substantive offenses for acts broken up by a distinct interruption—such as keeping the gun aimed at the victim for a brief period or taking a moment of contemplation before firing the gun at the victim and thereby committing a distinct assault with the deadly firearm—but the cold record in this case evinces no such interruption.

Defendant's two assault charges arise out of two acts that occurred in rapid succession and seemingly without interruption: raising his gun

and firing. The evidence here is not sufficient to allow a reasonable mind to conclude there was any interruption in Defendant's act of raising his gun and firing at Holley such that he could have been convicted of two separate assaults. We vacate the trial court's judgment as to the assault by pointing a gun conviction in order to prevent a manifest injustice.

During sentencing, the trial court ordered, "under the Class D felony of discharging a weapon into occupied property, assault by pointing a gun and assault with a deadly weapon, all of those are consolidated for one judgment, under the Class D[.]" Defendant's prior felony record level was I, and he was sentenced to an active sentence, near the top of the presumptive range, of 60 to 84 months. Where multiple convictions are consolidated into one judgment "but one of the convictions was entered in error, the proper remedy is to remand for resentencing when the appellate courts are unable to determine what weight, if any, the trial court gave each of the separate convictions in calculating the sentences imposed upon the defendant." *State v. Hardy*, 242 N.C. App. 146, 160, 774 S.E.2d 410, 420 (2015) (internal alterations and citation omitted). As we are unable to determine what weight, if any, the trial court gave to the erroneously entered assault conviction, we must remand for resentencing.

CONCLUSION

Defendant fails to show that the trial court erred in entering its judgment against him for discharging a firearm into an occupied dwelling, proceeding based on the State's indictment, or in failing to dismiss the charge of discharging a firearm into an occupied dwelling. Although not properly preserved for appeal, we invoke Rule 2 to vacate the charge of assault by pointing a gun in order to prevent a manifest injustice, and remand for resentencing.

NO ERROR IN PART; VACATED IN PART; REMANDED FOR RESENTENCING.

Judges DILLON and ARROWOOD concur.

STATE v. MARSH

[265 N.C. App. 652 (2019)]

STATE OF NORTH CAROLINA
v.
BOYD DOUGLAS MARSH, DEFENDANT

No. COA18-808

Filed 4 June 2019

Sentencing—plea agreement—sentence different from plea agreement—right to withdraw guilty plea

The trial court erred by imposing a sentence inconsistent with defendant's plea agreement where the plea agreement called for a single consolidated sentence and the trial court entered two separate, concurrent sentences. Even though the amount of time served under the concurrent sentences was materially the same as the single consolidated sentence in the plea agreement, the trial court was required to inform defendant of his right to withdraw his guilty plea, pursuant to N.C.G.S. § 15A-1024, because the sentences imposed differed from the plea agreement.

Appeal by Defendant from judgment entered 29 November 2017 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 13 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott Stroud, for the State.

Kimberly P. Hoppin for the Defendant.

DILLON, Judge.

Defendant Boyd Douglas Marsh appeals the trial court's denial of his motion to withdraw his guilty plea. Alternatively, he appeals the sentence imposed by the trial court, alleging that it was inconsistent with the sentence outlined in his plea agreement with the State. After careful review, we vacate the trial court's judgment and remand for further proceedings.

I. Background

Defendant was charged with multiple counts of rape, kidnapping, and a number of related offenses, involving multiple victims and occurring between 1998 and 2015. In March 2017, Defendant was tried by a jury.

On the third day of trial, Defendant negotiated a plea agreement with the State whereby he pleaded guilty to a number of offenses. Based on the plea agreement, Defendant would receive a single, consolidated active sentence of two hundred ninety (290) to four hundred eight (408) months imprisonment.

Over the next four weeks, and prior to sentencing, Defendant wrote two letters to the trial court. In them, he proclaimed his innocence to some of the charges and suggested his desire to withdraw from his plea agreement. The trial court acknowledged receipt of the letters and forwarded them to Defendant's attorney.

Several months later, in November 2017, Defendant appeared before the trial court for sentencing. During the hearing, he formally moved to withdraw his guilty plea. The trial court denied Defendant's motion. The trial court, then, proceeded with sentencing. Though the plea agreement called for a single, consolidated judgment imposing a single sentence, the trial court entered *two* judgments, one for the 2015 offenses and one for the 1998 offenses, based on the fact that the sentencing grid in use in 1998 was different from the grid in use in 2015. Specifically, the trial court entered a judgment, sentencing Defendant to a term of two hundred ninety (290) to four hundred eight (408) months for the 2015 offenses, a sentence which matched the sentence Defendant agreed to in his plea agreement with the State. And for the 1998 offenses, the trial court entered a separate judgment with a slightly shorter sentence of two hundred eighty-eight (288) to three hundred fifty-five (355) months imprisonment. The trial court did, though, order that the two sentences would run concurrently, such that Defendant would not actually serve any longer than contemplated in his plea agreement with the State.

Defendant gave oral notice of appeal in open court.[1]

II. Analysis

Defendant makes two arguments on appeal. First, Defendant argues that the trial court erred by denying his motion to withdraw his guilty plea prior to being sentenced. Defendant made it known to the trial court quickly that he did not like the plea agreement into which he had

1. Defendant's oral notice of appeal adequately preserved his arguments with respect to the trial judge's denial of his motion to withdraw his guilty plea. *See* N.C. R. App. P. 4(a). However, Defendant failed to object to any portion of the trial judge's sentencing at trial, and further did not make any reference to sentencing procedures in his notice of appeal. Contemporaneous with this appeal, Defendant filed a motion for writ of *certiorari* asking that we address his arguments as to sentencing despite errors in preservation. We elect to grant Defendant's motion to reach the merits of Defendant's appeal.

entered. But his attorney did not formally move on his behalf to withdraw the plea until much later. Our Supreme Court has instructed that a defendant's burden is low when his motion is made soon after entering his plea. *See State v. Handy*, 326 N.C. 532, 539, 391 S.E.2d 159, 162-63 (1990). In any event, because we conclude that Defendant is entitled to relief based on his *second* appellate argument, we do not need to decide this first issue.

In his second argument, Defendant contends that the trial court erred in imposing a sentence inconsistent with the sentence set out in his plea agreement without informing Defendant that he had a right to withdraw his guilty plea. For the following reasons, since we conclude that the concurrent sentences imposed by the trial court differed from the single sentence agreed to by Defendant in his plea agreement, we agree with Defendant.

Section 15A-1024 of our General Statutes provides that a defendant must be informed and allowed to withdraw his plea where the sentence to be imposed differs from what was agreed upon:

> If at the time of sentencing, the judge for any reason determines to impose a sentence *other than* provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

N.C. Gen. Stat. § 15A-1024 (2017) (emphasis added).

Here, Defendant's plea arrangement for all his 1998 and 2015 offenses which stated, in relevant part, that Defendant would "receive a consolidated active sentence of 290 to 408 months." The trial court judge, though, determined that Defendant's 1998 offenses fell under a different sentencing grid than his 2015 offenses, where the 1998 offenses warranted lesser minimum and maximum sentences. In an apparent effort to accommodate this difference, the judge entered two separate, but concurrent, sentences.

The State contends that, though the sentences entered were objectively different than the sentence described in the plea agreement, any possible error was harmless because the judge's sentence was practically the same. That is, the time Defendant will serve under the concurrent sentences is the same as he would have served if he had received the single sentence contemplated in his agreement with the State.

Much of our precedent where relief has been granted under Section 15A-1024 involves instances where the sentence imposed by the judge was *significantly* different from or more severe than that agreed upon in the defendant's plea agreement.[2] However, our precedent is clear that any change by the trial judge in the sentence that was agreed upon by the defendant and the State, even a change benefitting the defendant, requires the judge to give the defendant an opportunity to withdraw his guilty plea. For instance, our Supreme Court has suggested the meaning of Section 15A-1024 to include situations where the sentence imposed is merely "different from" the sentence agreed to:

> The equally unambiguous language of 15A-1024 discloses that this statute applies in cases in which the trial judge does not reject a plea arrangement when it is presented to him but hears the evidence and at the time for sentencing determines that a sentence *different from* that provided for in the plea arrangement must be imposed. Under the express provisions of this statute a defendant is entitled to withdraw his plea and as a matter of right have his case continued until the next term.

State v. Williams, 291 N.C. 442, 446-47, 230 S.E.2d 515, 517-18 (1976) (emphasis added).

And our Court has held that Section 15A-1024 is implicated even where the sentence imposed may be more favorable to the defendant that that which he had agreed to. *State v. Wall*, 167 N.C. App. 312, 316, 605 S.E.2d 205, 208 (2004). In *Wall*, the trial judge sentenced the defendant to a sentence less than the sentence described in the defendant's plea agreement. *Id.* Our Court held that the plain language of Section 15A-1024 applied when any sentence "different from" the plea agreement was imposed and vacated the defendant's judgment accordingly. *Id.* at 317-18, 605 S.E.2d at 208-09. Further, in *Wall*, we noted that the Official Commentary to Section 15A-1024 demonstrates that our General

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2. *See e.g.*, *State v. Puckett*, 299 N.C. 727, 730-31, 264 S.E.2d 96, 98-9 (1980) (vacating the trial court's sentence because the court inappropriately sentenced the defendant to two *consecutive* two-year sentences, inconsistent with the plea deal agreeing to a sentence of no more than two years total); *State v. Carricker*, 180 N.C. App. 470, 471-72, 637 S.E.2d 557, 558-59 (2006) (vacating the trial court's sentence because it revoked the defendant's nursing license, where her plea agreement did not include license revocation); *State v. Rhodes*, 163 N.C. App. 191, 195, 592 S.E.2d 731, 733 (2004) (vacating the sentence because the trial court sentenced the defendant to an active sentence of twenty-one (21) to twenty-six (26) months incarceration, inconsistent with the plea agreement for a sentence of twenty-one (21) to twenty-six (26) months incarceration to be suspended for three years).

Assembly intended for the statute "to apply if there is *any change at all* concerning the substance[]" of the sentence imposed, rejecting to use the phrase "more severe than" in the statutory language. *Wall*, 167 N.C. at 316, 605 S.E.2d at 208 (quoting N.C. Gen. Stat. § 15A-1024) (emphasis added)).

We conclude that the two separate judgments/sentences imposed by the trial judge are different than the single, consolidated judgment/sentence that Defendant had agreed to. *See State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002) ("A plea agreement is treated as contractual in nature[.]"). Though the total amount of time served in the concurrent sentences is materially the same as the single consolidated sentence in Defendant's plea agreement, Defendant is still liable for two separate judgments and two separate sentences. This is not what he agreed to. And, for example, if for any reason one of the judgments was later vacated, Defendant would still be left with an outstanding judgment and corresponding sentence.

We recognize that, ordinarily, "[a] judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962). However, our review of the case law shows no instances where a harmless or prejudicial error standard has been applied in cases involving Section 15A-1024, as plea arrangements are *contractual* in nature.

III. Conclusion

We hold that the trial court was required to inform Defendant of his right to withdraw his guilty plea pursuant to Section 15A-1024. We, therefore, must vacate the trial court's judgments and remand the matter for further proceedings consistent with this opinion. Since Defendant was entitled to withdraw his plea based on the sentencing, we conclude that Defendant is no longer bound by the plea arrangement; but neither is the State. *See Puckett*, 299 N.C. at 731, 264 S.E.2d at 99 (remanding under Section 15A-1024 with instructions "that the judgments of the trial court be vacated, that defendant's plea of guilty be stricken, and that the cases be reinstated on the trial docket"). On remand, the State and Defendant are, of course, free to enter into a new plea arrangement.

VACATED AND REMANDED.

Judges BRYANT and ARROWOOD concur.

STATE v. WILLIAMS

[265 N.C. App. 657 (2019)]

STATE OF NORTH CAROLINA
v.
TAMORA WILLIAMS

No. COA18-994

Filed 4 June 2019

Damages and Remedies—criminal restitution award—embezzlement—not precluded by prior civil settlement agreement and release

In a case of first impression, the Court of Appeals determined that a release clause in a civil settlement agreement—in which an employee agreed to repay funds she misappropriated from her employer—did not preclude an award of criminal restitution in an embezzlement prosecution based on the same underlying conduct. The civil settlement and release—to which the State was not a party—and restitution award represented separate, distinct remedies that served different purposes.

Appeal by defendant from judgment entered 12 April 2018 by Judge James K. Roberson in Alamance County Superior Court. Heard in the Court of Appeals 7 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Madeline G. Lea, for the State

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

TYSON, Judge.

Tamora Williams ("Defendant") appeals from a criminal judgment ordering her to pay restitution. We affirm the trial court's order.

I. Background

Defendant was employed as an office manager at GCF, Incorporated ("GCF") from March 2014 to February 2016. GCF is a general construction company located in Burlington and owned by Charles Clifton Fogleman ("Fogleman"). Defendant's duties with GCF included managing billing, collections, bids, quotes, bank accounts, and payroll.

Other than Fogleman, Defendant was the only person with GCF who was authorized to use the business checking account and debit card.

In January 2016, Fogleman asked Defendant to collect documents relating to the business checking account so that he could prepare GCF's corporate tax filing. In response to Fogleman's request, Defendant allegedly admitted that she had been misappropriating funds from GCF's business account. Fogleman discovered that the GCF debit card had been used for personal purchases at various retail establishments over the previous seventeen months. Fogleman terminated Defendant's employment with GCF.

Fogleman prepared a spreadsheet listing 354 unauthorized expenditures and misappropriations by Defendant. The spreadsheet included the amount, date, and nature of each allegedly improper expenditure. Fogleman reported Defendant's actions and turned over the itemized spreadsheet to the Burlington Police Department.

Defendant was arrested for embezzlement on 5 March 2016. On 25 May 2016, Defendant filed a civil complaint against Fogleman for claims of slander and defamation. On 10 August 2016, Fogleman filed an answer and asserted counterclaims for embezzlement and employee theft.

Defendant and Fogleman mediated their claims. On 13 February 2017, the parties entered into a settlement agreement. Defendant agreed to pay Fogleman $13,500.00 as part of the settlement agreement resolving the civil claims. The settlement agreement contained the following release clause:

> The parties hereby release and fully discharge each other of and from any and all claims, causes of actions, demands and damages, known and unknown, asserted and unasserted, from the beginning of time to the date hereof, except as set forth herein.

On 26 February 2018, the State charged Defendant by information for embezzlement. That same day, Defendant entered an *Alford* plea to one count of embezzlement. As part of Defendant's plea arrangement, the State agreed to dismiss four counts of forgery, four counts of uttering a forged instrument, and two counts of embezzlement. The State also consented to a probationary sentence to allow Defendant to make restitution payments. Both Defendant and the State expressly agreed to the trial court holding a hearing to determine the amount of restitution.

The restitution hearing was held on 27 February 2018. Fogleman contended he had signed the settlement agreement with the understanding that the civil settlement had "nothing to do with the criminal matter." The State sought restitution of $41,204.85. Defendant asserted she did

not owe any restitution because her settlement payment of $13,500.00 to Fogleman in the civil action was payment in full under the terms of the settlement agreement and no further restitution was due.

On 23 March 2018, the trial court entered a written order containing findings of fact and conclusions of law. The trial court's order concluded, in relevant part:

> 2. The Settlement Agreement entered in the Civil action does not prohibit the Court in the Criminal action from determining an amount of restitution to be paid from the Defendant to the victim in this Criminal action.
>
> 3. The Defendant is entitled to a credit against the gross amount of restitution determined by this Order in the amount of $13,500.00, representing the amount paid by the Defendant in connection with the Settlement Agreement in the Civil action.

The trial court determined the gross amount of restitution owed by Defendant was $41,204.85. The trial court credited Defendant for paying $13,500.00 under the civil settlement agreement and set the balance of restitution due at $27,704.85.

On 12 April 2018, the trial court sentenced Defendant to six to seventeen months imprisonment, which was suspended for a period of thirty-six months of supervised probation, and ordered Defendant to pay $27,704.85 in restitution. The trial court's judgment imposed the payment of restitution as a condition of Defendant's probation. Defendant gave notice of appeal and filed a petition for writ of certiorari with this Court.

II. Issue

Defendant argues the trial court erred in ordering her to pay criminal restitution because the civil settlement agreement between her and Fogleman contained a binding release clause.

This issue presents a question of first impression in North Carolina of whether a civil settlement agreement containing a release clause can bar a party to the settlement agreement from later receiving restitution in a criminal action relating to the civil claim.

III. Jurisdiction

A defendant entering an *Alford* plea has no statutory right to appeal the trial court's judgment. *See* N.C. Gen. Stat. § 15A-1444(e) (2017).

Defendant has petitioned this Court to issue a writ of certiorari to review her arguments regarding the trial court's judgment, which ordered restitution, on the merits. *See id.* (a "defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari"); N.C. R. App. P. 21(a)(1) (granting this Court authority to issue a writ of certiorari "in appropriate circumstances" to review lower court judgments and orders).

The Supreme Court of North Carolina has held: "The decision concerning whether to issue a writ of certiorari is discretionary, and thus, the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause." *State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016).

After considering the arguments presented in Defendant's principal and reply briefs, the State's response, and in Defendant's petition for writ of certiorari, we determine Defendant's challenge to the trial court's judgment presents "good and sufficient cause" to review. *Id.* We exercise our discretion to issue a writ of certiorari in order to review the trial court's judgment ordering restitution. *See id.*

IV. Standard of Review

We review *de novo* whether the release clause in the civil settlement agreement bars an award of criminal restitution. *See Williams v. Habul*, 219 N.C. App. 281, 289, 724 S.E.2d 104, 109 (2012) ("A settlement agreement is a contract governed by the rules of contract interpretation and enforcement"(citations omitted)); *Price & Price Mech. of N.C., Inc. v. Miken Corp.* 191 N.C. App. 177.,179, 661 S.E.2d 775, 777 (2008) ("questions of contract interpretation are reviewed as a matter of law and the standard of review is *de novo*" (citation omitted)). With regard to the trial court's judgment, "awards of restitution are reviewed *de novo*." *State v. Buchanan*, __ N.C. App. __, __, 818 S.E.2d 703, 709 (2018).

V. Analysis

Defendant argues the settlement agreement terminating her and Fogleman's civil lawsuit barred the trial court from ordering further restitution in her criminal prosecution because the settlement agreement contains a general release clause. Defendant contends: "[t]he release clause discharged all claims *between the parties* and barred all

subsequent rights to recover with respect to the offense." (Emphasis supplied). Defendant concedes the release clause did not bind the State from prosecuting her for embezzlement, nor did the settlement payment of $13,500.00 to Fogleman absolve Defendant her crimes. *See State v. Pace*, 210 N.C. 255, 257-58, 186 S.E. 366, 368 (1936) ("the restitution of money that has been either stolen or embezzled, or a tender or offer to return the same or its equivalent to the party from whom it was stolen or embezzled, does not bar a prosecution by indictment, and conviction for such larceny or embezzlement" (citation omitted)).

Defendant also contends the State could not obtain an award of restitution in the course of the criminal proceedings. We disagree because civil settlement agreements and restitution awards are separate and distinct remedies, pursued for different ends.

A. Issue of First Impression

When this Court reviews an issue of first impression, it is appropriate to look to decisions from sister state jurisdictions for persuasive guidance. *See Skinner v. Preferred Credit*, 172 N.C. App. 407, 413, 616 S.E.2d 676, 680 (2005) ("Because this case presents an issue of first impression in our courts, we look to other jurisdictions to review persuasive authority that coincides with North Carolina's law"), *aff'd*, 361 N.C. 114, 638 S.E.2d 203 (2006).

The Supreme Court of Florida reviewed an analogous issue in *Kirby v. Florida*, 863 So.2d 238 (Fla. 2003). In *Kirby*, a police officer caused a traffic accident by driving under the influence which resulted "in the serious bodily injury to another." *Id.* at 240. The police officer settled the civil claims with the victim. *Id.* The terms of the settlement agreement released the officer from any civil liability in exchange for "the payment by [the police officer's] insurance company of $25,000- the insurance policy limits." *Id.*

A jury found the officer guilty of driving under the influence and sentenced him to five years of probation, a downward departure from the sentencing guidelines. *Id.* The trial court justified the downward departure by concluding that " 'the need for payment of restitution to the victim outweigh[ed] the need for a prison sentence.' " *Id.* at 241. The trial court awarded the victim "restitution for the out-of-pocket medical expenses, deductibles, and lost wages" beyond the $25,000 the police officer owed "pursuant to the settlement agreement." *Id.* at 241.

The officer-defendant challenged the restitution imposed and asserted the settlement agreement as a bar. The prosecution contended

"the settlement agreement contained a release of all liability, but argued that because the [s]tate was not a party to the agreement the victim could not prevent the [s]tate from exercising its statutory right to seek restitution." *Id.* at 241. The trial court rejected the prosecution's argument and refused to order restitution. *Id.*

When the case reached the Supreme Court of Florida, the court evaluated "whether a settlement and release of liability between a victim and a defendant on a civil claim for damages prior to the disposition of a criminal case based on the same incident prohibits the trial court as a matter of law from ordering restitution." *Id.* at 240. The Court concluded "[b]ecause civil settlements and criminal restitution are distinct remedies with differing considerations," a civil settlement does not bar the trial court from exercising its statutory authority to order restitution in criminal matters. *Id.*

The court in Florida recognized restitution in criminal cases promotes "distinct societal goals" including: "(1) to compensate the victim and (2) to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system." *Id.* at 242 (citations omitted). Furthermore, restitution "forces the defendant to confront, in concrete terms, the harm his actions have caused." *Id.* at 243 (citations omitted).

That court also noted civil settlements do not "reflect the willingness of the People to accept that sum in satisfaction of the defendant's rehabilitative and deterrent debt to society." *Id.* at 243 (citations omitted). Circumstances which lead a party to settle a civil claim "should have no bearing on the court's statutory duty to order restitution for the damage or loss caused by the defendant's criminal conduct." *Id.* at 244 (citations omitted).

Several other states comport with the Supreme Court of Florida's holding. *See New Jersey v. DeAngelis*, 747 A.2d 289, 294 (N.J. Super. Ct. App. Div. 2000) ("civil settlement or release does not absolve the defendant of criminal restitution"); *Fore v. Alabama*, 858 So. 2d 982, 985 (Ala. Crim. App. 2003) ("[p]rivate parties cannot settle a civil claim and thereby agree to waive the subsequent application of the criminal statute"); *Haltom v. Indiana*, 832 N.E.2d 969, 972 (Ind. 2005) ("allowing a civil settlement to preclude restitution altogether would infringe upon the State's power to administer criminal punishment"); *People v. Bell*, 741 N.W.2d 57, 60 (Mich. Ct. App. 2007) ("restitution must be paid…regardless of the existence of the civil settlement").

Our research determined one jurisdiction disagrees with the above line of cases. *See Minnesota v. Arends*, 786 N.W.2d 885, 889 (Minn. Ct.

App. 2010). The Minnesota Court of Appeals concluded "that when an alleged victim has made a complete, valid civil settlement of all claims resulting from a criminal offense, the state is precluded from seeking restitution." *Id.* No other state has followed the *Arends* line of cases.

B. Civil Release Does Not Bar Restitution

We find the reasoning of the Supreme Court of Florida and the other similar noted state courts as persuasive. As in *Kirby*, the restitution order gives Defendant the opportunity "to confront, in concrete terms" the harm caused by her misappropriating employer funds through the personal use of the GCF debit card at various retail establishments. *Kirby*, 863 So.2d at 243. Here, the trial court considered the value of the property taken minus the value of the property that Defendant has previously returned via a civil settlement in order to reach the conclusion that she owed Fogleman restitution of $27,704.85.

The trial court's order reflects "the People['s]" satisfaction in resolving the issue and absolving the debt. *Kirby*, 863 So.2d at 243. Although the circumstances which gave rise to the agreement have no bearing, here the settlement agreement specifically states that "the civil matter has been fully resolved."

In addition, trial courts maintain the statutory right to order restitution "as a condition of probation . . . to an aggrieved party." N.C. Gen. Stat. § 15A-1343(d) (2017). Similar to the officer's sentence's downward deviation in *Kirby*, as part of Defendant's plea agreement, the State dismissed several other charges in exchange for the restitution payment. The State also consented to a "probationary sentence to allow Defendant to make restitution payments."

Defendant argues that under the plain terms of the settlement agreement, Fogleman could not seek more recovery from Defendant than the $13,500.00 he undisputedly agreed to accept in order to settle the civil actions. To hold otherwise, according to Defendant, would deprive her of the benefit of the bargain she obtained from the valid settlement agreement. Although the plain terms of the settlement agreement suggest Fogleman could not seek more recovery from Defendant than the $13,500.00 he undisputedly agreed to accept, the plain language of the settlement agreement expressly limited its application to the parties "releas[ing] and fully discharg[ing] each other." The agreement also specifically states that "the civil matter has been fully resolved," limiting the release clause strictly to the parties to the civil matter, and not including the State.

Fogleman also testified the settlement agreement he signed "had nothing to do with the criminal matter." His testimony that the settlement agreement pertained solely to the civil matter may show ambiguity in the terms of the agreement. Where there is ambiguity, the court "look[s] beyond the terms of the contract to determine the intentions of the party." *Stovall v. Stovall*, 205 N.C. App. 405, 410, 698 S.E.2d 680, 684 (2010). The State points to Fogleman's testimony at the restitution hearing regarding his intention in signing the settlement agreement:

> [Prosecutor]: And [would] you tell the Court what your understanding was of this civil issue?
>
> [Fogleman]: Yeah, it was a civil matter.
>
> [[Prosecutor]: And what do you mean by that?
>
> [Fogleman]: It has nothing to do with the criminal matter that we're here with – about today.
>
> [Prosecutor]: Was that your understanding when you signed the agreement?
>
> [Fogleman]: That was the only way that I was going to sign the agreement.

The intention of the parties at the time of execution determines the meaning of a release. *McGaldrey, Hendrickson & Pullen v. Syntek Finance Corp.*, 92 N.C. App. 708, 711, 375 S.E.2d. 689, 691 (1989). "[T]heir intention is determined from the language used, the situation they were in, and the objects they sought to accomplish." *Id.* Fogleman and Defendant were the exclusive parties to that agreement. The settlement agreement did not involve or bind the State of North Carolina. The State brought criminal charges for crimes committed against the peace of the state.

Adopting the persuasive authority set forth above, "because the State was not a party to the agreement[,] the victim could not prevent the State from exercising its statutory right to seek restitution." *Kirby*, 863 So. 2d at 241. Private settlement or reimbursement agreements neither usurp the State's ability to uphold criminal statutes nor impede on the State's "distinct societal goals" of the criminal justice system. *Id.* at 243.

Restitution is characterized as a "*reparation* to an aggrieved party . . . for the damage or loss caused by the defendant arising out of" the criminal offense. *State v. Reynolds*, 161 N.C. App. 144, 149, 587 S.E.2d 456, 460 (2003) (citing N.C. Gen. Stat. § 15A-1343(d) (2001)) (emphasis supplied).

Here, the trial court ordered Defendant to pay $41,204.85 to compensate Fogleman for his losses due to Defendant's embezzlement, less than the amount Fogleman claimed was taken. The court allowed Defendant a $13,500.00 credit for what she has already paid under the civil settlement agreement towards making Fogleman whole. To compensate for losses, the trial court properly ordered Defendant to pay the balance of restitution of $27,704.85. The intention of the restitution order is to restore what Defendant took and make Fogleman whole for his losses. Defendant's arguments are overruled.

VI. Conclusion

The State is not precluded from seeking restitution on a victim's behalf in a subsequent criminal prosecution. The trial court correctly concluded that "[t]he Settlement Agreement entered in the Civil action does not prohibit the Court in the Criminal Action from determining an amount of restitution to be paid from the Defendant to the victim in this criminal action."

The civil settlement and release and the criminal restitution represent separate, distinct remedies. The trial court's restitution order is affirmed. *It is so ordered.*

AFFIRMED

Judges INMAN and ARROWOOD concur.

BRUCE TAYLOR AND SUSAN A. TAYLOR, PLAINTIFFS
v.
THOMAS HIATT, THOMAS R. HIATT AND JEWEL HOLLARS, DEFENDANTS

No. COA18-864

Filed 4 June 2019

Easements—private access road—construction of gates— "open" requirement

In a dispute involving the construction of a gate on an easement, where the land began as a single tract but was divided into six tracts over the years, a later-in-time map contained no language requiring a private road to remain "open," so plaintiffs were permitted to build a gate across that later easement, so long as it did not materially impair or unreasonably interfere with defendants' right

of ingress and egress. However, an earlier-in-time map required a different private road to remain "open," so plaintiffs were not permitted to build a gate across that earlier easement (even if they provided defendants with access codes). Since the record was unclear as to where exactly the gates were located and other facts, summary judgment was inappropriate for either party.

Appeal by Plaintiff from order entered 8 March 2018 by Judge James K. Roberson in Alamance County Superior Court. Heard in the Court of Appeals 13 February 2019.

Oertel, Koonts & Oertel, PLLC, by Geoffrey K. Oertel, for the Plaintiffs-Appellants.

Pittman & Steele, PLLC, by Timothy W. Gray, for the Defendants-Appellees.

DILLON, Judge.

Plaintiffs brought this action seeking a declaration and other relief concerning an easement extending across Plaintiffs' property to Defendants' property. Plaintiffs appeal the trial court's order granting summary judgment to Defendants. After review of the materials before the trial court, we reverse and remand.

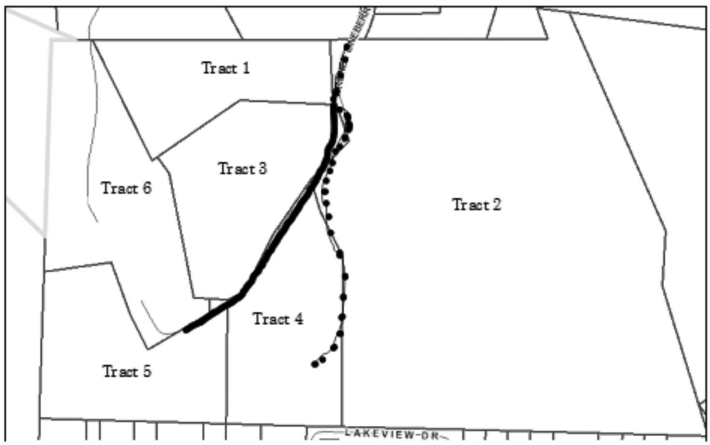
I. Background

Plaintiffs and Defendants own adjacent tracts of land in rural Alamance County. Defendants access a nearby State road via easements (private roads) which span across Plaintiffs' land. Plaintiffs built two gates and fencing somewhere along these private roads to fence in their horses. These gates do not prevent Defendants from being able to access the public road, as Plaintiffs have provided Defendants with the access code for the gates. However, Defendants contend that, based on language in the chain of title concerning the easements, Plaintiffs are not allowed to construct the gates on the easement. Plaintiffs commenced this action, seeking a declaration of their right to construct and maintain the gates in question. Defendant counterclaimed, seeking a declaration that Plaintiffs have no right to erect and maintain the gates and an order directing Plaintiffs to remove the gates.

A. Title History and Creation of the Easements

The chain of title at issue is described herein. The map below is included for clarity. The map depicts six tracts of land, referenced in

this opinion as Tracts 1-6. Plaintiffs own Tracts 1 and 3. Defendants own Tract 4. The other tracts, Tracts 2, 5, and 6, are not subject to this present dispute. Defendants access Roney Lineberry Road (a public road shown at the top of the map just above Tract 2) via two private roads. These private roads are depicted on the map below as a dotted line and a thick line, respectively. The location of these roads, as shown on the map, is approximate. The record before us is not clear as to the precise location of these roads.



The history of these tracts, including Plaintiffs' and Defendants' tracts, is as follows:

As of 1989, Tracts 1-6 were all part of a *single tract* (approximately one hundred nine (109) acres in area) and were owned by the Estate of C.R. Roney (the "Estate"). Over the years, there have been four maps filed to subdivide this large tract, ultimately into six tracts. And over the years, two easement roads have been created to provide access to these tracts as they were being created: the dotted-line road depicted above was created by a map recorded in 1989, and the solid line road depicted above was created by a map that was recorded in 2000.

1. 1989: Division of Large Tract into Two Tracts; Creation of First Easement

In 1989, the Estate recorded a map (the "1989 Map") that divided the one hundred nine (109) acre tract into *two* separate tracts: one tract consisting of approximately sixty-six (66) acres, which today comprises

Tracts 1 and 2; and another tract consisting of approximately forty-three (43) acres, which today comprises Tracts 3-6.

Through the filing of this 1989 Map, an easement was created (the "1989 Easement"), depicted above as the dotted-line road, to provide access points of egress and ingress to various parts of *both* large tracts. That is, the 1989 Easement provides more than one access point to each of the two large tracts, as it meanders at or near the border dividing the two tracts.

Of significance to this present dispute, the 1989 Map indicates that this 1989 Easement is to remain "open for egress and regress" for the benefit of the owner of the newly formed sixty-six (66) acre and forty-three (43) acre tracts created by the division, stating as follows:

> Note: The existing private road shall remain open for egress and regress to [the sixty-six (66) acre and forty-three (43) acre tracts formed by the 1989 Map]. Road shall be maintained by the "owner" or "owners" of [the two tracts].

2. 1996: Division of 66-Acre Tract into Two Tracts

In 1996, the owner of the sixty-six (66) acre tract filed a map (the "1996 Map") subdividing that tract into two tracts, depicted above as Tract 1 (nine acres) and Tract 2 (fifty-seven (57) acres). The 1996 Map depicts the 1989 Easement, the dotted-line road depicted above, in essentially the same location as depicted on the 1989 Map, reiterating that the easement is to remain open for the benefit of the adjacent forty-three (43) acre tract as well as the newly formed Tracts 1 and 2, which had made up the sixty-six (66) acre tract.

3. 2000: Division of 43-Acre Tract into Three Tracts

In 2000, the owner of the forty-three (43) acre tract filed a map (the "2000 Map") subdividing that tract into three tracts, depicted above as Tract 3, Tract 4, and a tract now comprised of Tracts 5 and 6.[1] The 2000 Map depicts the top portion of the 1989 Easement, but also depicts a *new private road* (the "2000 Easement"), shown in the above map as the solid line, to provide access from the 1989 Easement to the three newly formed tracts, Tracts 3, 4 and what are now 5 and 6.

The 2000 Easement is described on the 2000 Map as a "30' R/W [right-of-way] EASEMENT." The 2000 Map, however, does not contain

1. The 2000 Map did not create Tracts 5 and 6 as two separate tracts, but as one tract. The subdivision of Tracts 5 and 6 occurred later, but that subdivision is not relevant to this present matter.

any other language concerning this new 2000 Easement. That is, unlike the 1989 Map's description of the 1989 Easement, there is *no* language in the 2000 Map indicating that the 2000 Easement is to remain "open."

B. Plaintiffs' Construction of the Gates

In 2017, Plaintiffs, who own Tracts 1 and 3, erected two access gates to keep their horses secured on their tracts. There is nothing in the record indicating exactly *where* on Plaintiffs' tracts the gates were installed. In other words, there is nothing in the record to indicate whether the gates were installed on the 1989 Easement or the 2000 Easement, as some portion of both easements are on Plaintiffs' land.

Plaintiffs provided Defendants with the access code to the gates so that Defendants could still access Roney Lineberry Road by way of the easements. But, over the course of time, a number of disputes between the parties arose concerning the gates.

C. Procedural History

In July 2017, Plaintiffs commenced this action requesting a declaratory judgment regarding their right to construct and maintain the gates. Defendants answered and counterclaimed, requesting removal of the access gates.

In March 2018, after a hearing on the matter, the trial court entered an amended judgment declaring that Plaintiffs were prohibited "from having gates, bars, fences and the like on the Private Road" *and* directing Plaintiffs to "remove the gates erected upon the Private Road[.]" The trial court certified its order for immediate appellate review. Plaintiffs timely appealed.

In April 2018, while their appeal was pending with our Court, Plaintiffs filed a motion for relief with the trial court, requesting that they be allowed to offer into evidence a new survey which purported to show where the gates were in fact located. Plaintiff contended that this survey constituted new evidence on which the trial court should reverse its prior order. The trial court indicated that it would likely deny the motion, but did not have jurisdiction to do so in light of Plaintiffs' pending appeal.

II. Analysis

Plaintiffs appeal an order granting Defendants summary judgment against Plaintiffs' claims. We review a grant of summary judgment *de novo*, to determine whether the record shows, in the light most favorable

to the nonmoving party, that there was no genuine issue of material fact remaining for the trial court to resolve. *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007). In our review, we may only consider the record on appeal, composed of the materials before the trial court at the time of the hearing. *Waste Mgmt. of Carolinas, Inc., v. Peerless Ins. Co.*, 315 N.C. 688, 690, 340 S.E.2d 374, 377 (1986).

Typically, the owner of a servient estate "may erect gates across [an easement] when necessary to the reasonable enjoyment of his estate, provided they are not of such nature as to materially impair or unreasonably interfere" with the purpose of the easement to the dominant estate. *Chesson v. Jordan*, 224 N.C. 289, 293, 29 S.E.2d 906, 909 (1944); *accord Merrell v. Jenkins*, 242 N.C. 636, 637-38, 89 S.E.2d 242, 243-44 (1955). However, our Supreme Court has held that the owner of a servient estate generally may *not* erect gates on an easement where the instrument granting the easement provides that the easement is to remain "open," stating as follows:

> Generally, the grant of a way without reservation of the right to maintain gates does not necessarily preclude the owner of the land from having them; *unless it is expressly stipulated that the way shall be an open one or it appears from the terms of the grant or the circumstances that such was the intention*, the owner of the servient estate may erect gates across the way if they are constructed so as not to interfere unreasonably with the right of passage.

*Setzer v. Anna*s, 286 N.C. 534, 539, 212 S.E.2d 154, 157 (1975) (emphasis added). Indeed, our Supreme Court has interpreted express language suggesting that an easement remain "open" to mean that it must be free of obstructions, such as fences or gates. *See Patton v. W. Carolina Educ. Co.*, 101 N.C. 408, 409-11, 8 S.E. 140, 141-42 (1888) (holding that "[a] street, with gates or fences across it, is not what was reserved" by a deed stating "that the street now opened up through to the college land . . . *shall be kept open*" (emphasis added)).

It is unquestioned that the 2000 Map creating the 2000 Easement and the 1989 Map creating the 1989 Easement are in Defendants' chain of title. Defendants acquired their property, Tract 4, in 2007 in fee simple via a general warranty deed. The deed expressly conveyed "a permanent access easement for ingress, egress, and regress over and upon the 30 ft right of way as shown on said plat of survey" recorded in "Plat Book 65 at Page 118," the location of the 2000 Map. It is true that the 2000 Map

contains no language requiring the easement to remain open, but it does refer to the "[r]ight of way along Existing Private Road as per Deed Book 1056, Page 56." Deed Book 1056, Page 56, contains the deed conveying all of Tracts 1 and 2 from the Roney family, "subject to the right of way of the private road shown on [Plat Book No. 39 at Page 160,]" which is the 1989 Map.

The trial court granted Defendants' summary judgment motion, determining that Defendants are entitled to have that portion of the private road upon which Plaintiffs constructed their gates to remain open and to require Plaintiffs to remove the gates. We conclude that Defendants were not entitled to summary judgment for the reasons stated below.

There is nothing on the 2000 Map or other documents in the chain of title which suggests that the parties intended that the private road comprising the 2000 Easement had to remain "open." Therefore, we conclude that Plaintiffs "may erect gates across [the 2000 Easement] when necessary to the reasonable enjoyment of [their] estate, provided they are not of such nature as to materially impair or unreasonably interfere" with the purpose of the easement to Defendants' tract. *Chesson*, 224 N.C. at 293, 29 S.E.2d at 909; *see Runyon v. Paley*, 331 N.C. 293, 305, 416 S.E.2d 177, 186 (1992) (holding that the meaning of unambiguous language contained in an easement is a question of law). Whether the gates, if erected on the 2000 Easement, would actually materially impair or unreasonably interfere with Defendants' right of egress and ingress is not an issue before us.

We conclude further that Plaintiffs are, nonetheless, bound by the language contained in the 1989 Map with respect to the private road constituting the 1989 Easement: Plaintiffs must keep this easement "open." *See Setzer*, 286 N.C. at 539, 212 S.E.2d at 157. As such, we conclude that Plaintiffs are not allowed to install gates along the 1989 Easement. We further conclude that Defendants, as the owners of Tract 4, have the right to enforce this restriction.

We note that there is some discrepancy as to exactly whether some part of the 2000 Easement is actually part of the 1989 Easement as well. If so, that portion would be bound by the "open" requirement. Indeed, there is some discrepancy between the 1989 Map and the 1996 Map as to the exact location of the 1989 Easement.

In any event, the record shows that Plaintiffs' tracts, Tracts 1 and 3, contain portions of *both* the 1989 Easement and the 2000 Easement over which Defendants are allowed to travel to access Roney Lineberry Road

from Tract 4. And though Plaintiffs assert in their brief on appeal that the gates are on the 2000 Easement (and *not* the 1989 Easement), there is nothing in the record before us that either party points to which indicates upon *which* easement the gates are actually located. To be entitled to summary judgment, it was Defendants' burden to establish conclusively that the gates were on the 1989 Easement. Since Defendants have failed in meeting this burden, Defendants were not entitled to summary judgment.

Similarly, Plaintiffs are not entitled to summary judgment, as they failed to meet their burden of proving as a matter of law that their gates are on the 2000 Easement, and not on the 1989 Easement, and that the gates do not actually impair or otherwise unreasonably interfere with Defendants' use of that easement.

We, therefore, reverse the trial court's grant of summary judgment and remand this matter for further proceedings not inconsistent with this opinion.

REVERSED.

Judges INMAN and COLLINS concur.

THOMAS RAYMOND WALSH, M.D. AND JAMES DASHER, M.D., PLAINTIFFS
v.
CORNERSTONE HEALTH CARE, P.A., DEFENDANT

No. COA18-925

Filed 4 June 2019

Discovery—sanctions—specific basis—lack of notice—abuse of discretion

In an action between two doctors and their former employer, where the doctors clearly moved for sanctions against the employer pursuant to Rule of Civil Procedure 26(g) for discovery violations, the trial court abused its discretion by striking the employer's answer as a sanction for a violation of Rule 26(e). The order imposing sanctions was based on erroneous findings, and the employer never received proper notice that it might be sanctioned under Rule 26(e).

WALSH v. CORNERSTONE HEALTH CARE, P.A.

[265 N.C. App. 672 (2019)]

Appeal by defendant from order entered 21 March 2018 by Judge Jeffery K. Carpenter in Davidson County Superior Court. Heard in the Court of Appeals 13 March 2019.

Nelson Mullins Riley & Scarborough LLP, by G. Gray Wilson and Lorin J. Lapidus, for plaintiffs-appellees.

Bennett Guthrie Latham, PLLC, by Rodney A. Guthrie, Roberta King Latham, and Mitchell H. Blankenship, for defendant-appellant.

ZACHARY, Judge.

Defendant Cornerstone Health Care, P.A. appeals from the trial court's order striking Defendant's answer as a sanction for discovery violations. We vacate and remand.

Background

Plaintiffs Thomas Raymond Walsh, M.D. and James Dasher, M.D. filed the instant action against Defendant, their former employer, on 20 November 2014 asserting claims for breach of the implied covenant of good faith and fair dealing, breach of contract, common law unfair competition, and quantum meruit. A protracted discovery dispute thereafter arose between the parties, which, for purposes of the instant appeal, primarily involves Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing.

As part of the basis of their claim for breach of the implied covenant of good faith and fair dealing, Plaintiffs alleged that "[i]n recent years, defendant . . . became fundamentally unprofitable, and was able to pay its business debts only by arbitrarily reducing the compensation of certain disfavored physicians." Plaintiffs maintain that they were included among said group of "disfavored physicians," and that when Plaintiffs expressed dissatisfaction with their decreased compensation, Defendant retaliated by essentially demoting Plaintiffs in an effort to further reduce their compensation. On 20 September 2014, Plaintiffs voluntarily resigned from their employment with Defendant. Plaintiffs maintained that "Defendant's capricious, malicious, and retaliatory actions" constituted a breach of the implied covenant of good faith and fair dealing in their employment contracts.

Defendant served its initial response to Plaintiffs' First Set of Interrogatories and Request for Production of Documents on 4 May

2015. Interrogatory 7 directed Defendant to "[i]dentify, with specificity, all relevant documents that you or your attorney have which pertain to any issues or facts in this suit." Plaintiffs' Request 7 sought

> [a]ll statements, summaries of statements, correspondence, letters, memoranda, documents, records, notes, telephone logs, electronic mail, ms word documents, pdf files, or other papers, whether in written, printed, or electronic format, in your possession or control or to which you, your counsel, or representatives have access regarding or pertaining to the professional performance, competency, or personal opinions or views of either or both plaintiffs by [Defendant].

(Hereafter "professional and personal opinion documents"). Defendant objected to Request 7 on the grounds of privilege,[1] but nevertheless responded that it had nothing to produce.[2] Defendant's CEO verified under oath that the response to Request 7 was "true of her own knowledge and belief except those matters therein stated upon information and belief, and, as to those, she believe[d] them to be true."

On 26 July 2016, following the parties' fourth discovery-related motion, the Honorable Mark E. Klass entered an order requiring the parties to "confer and select . . . a qualified and capable forensic e-discovery vendor for the purpose of collecting and cataloging electronically stored communications, specifically e-mails, generated by" six of Defendant's corporate officers ("the e-discovery order"). According to Plaintiffs, when Defendant's e-discovery database became available to them in August 2017, Plaintiffs learned that Defendant had "intentionally withheld a vast number of highly relevant and damaging documents"—namely, e-mails between Defendant's officers—"which squarely pertain" to Defendant's professional and personal opinions of Plaintiffs, despite the CEO having attested, under oath, that no such documents existed. Accordingly, on 21 September 2017, Plaintiffs filed a motion for mandatory sanctions "pursuant to Rule 26(g) of the North Carolina Rules of Civil Procedure." Plaintiffs maintained that "[t]he discovery responses signed and attested to under oath by [Defendant's CEO] were interposed for the improper purpose of intentionally withholding a substantial cache of damaging

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1. Defendant indicated that it would provide a Privilege Log in its second supplemental response.

2. Defendant answered "none" in its first supplemental response to Plaintiffs' Request for Production 7, to which Defendant had directed Plaintiffs in its answer to Interrogatory 7, pursuant to Rule 33(c) of the North Carolina Rules of Civil Procedure.

documents, which has served to harass plaintiffs, cause unnecessary delay, and has needlessly and exponentially increased the cost of litigation." Plaintiffs argued that "[a]t this juncture, only the severe sanction of striking [Defendant's] answer is appropriate."

Plaintiffs' motion came on for hearing on 2 October 2017. The professional and personal opinion documents that Plaintiffs alleged were responsive to Interrogatory 7 and Request 7 were presented to the trial court for *in camera* review. Plaintiffs argued:

> Rule 26(g) is cited in our brief in full. . . . [It] essentially addresses the issue of improper purpose and that is to use the discovery process for a number of different improper reasons, but in this case to use the discovery process to wear down the opponent to needlessly increase the cost of litigation so eventually the party collapses under its weight.
>
> We think that's exactly what has occurred in this case. . . . The discovery responses that were signed by the defendant's CEO, falsely, were for the clear purpose of improperly withholding a substantial number of damaging documents pertaining again to our claims for breach of implied covenant of good faith and fair dealing.
>
> . . . .
>
> They denied the existence of these documents under oath twice . . . .
>
> . . . .
>
> So what we say essentially is this; the defendant's discovery misconduct is one of the most egregious examples that a Court will find to justify severe sanctions of striking their answer; otherwise, this pattern of false swearing of recalcitrants in discovery, it goes unpunished. That's why wisely Rule 26(g) was placed into effect in this jurisdiction . . . .

In response, Defendant argued that it did not produce the e-mails that Plaintiffs presented for *in camera* review because they were neither relevant nor responsive to Interrogatory 7 or Request 7, in that they "have nothing to do, there's nothing regarding the professional competence of these doctors as surgeons. . . . We commend those [e-mails] to your reading . . . . That will shed a lot of light on why we did not consider those to be relevant and responsive to any issue in the case." "[N]evertheless," Defendant noted, "they have now been produced."

On 21 March 2018, more than five months after the hearing, the trial court entered its order, finding that Plaintiffs' motion was filed "specifically for failure to supplement as required under Rule 26(e) of the N.C. Rules of Civil Procedure." The trial court found that the documents that Plaintiffs presented for *in camera* review were both relevant and responsive to Interrogatory 7 and Request 7,[3] and concluded that "Defendant's failure to appropriately supplement its responses to the discovery requests of the Plaintiffs [under Rule 26(e)] justifies the imposition of sanctions." The trial court further concluded that "no lesser sanction than" striking Defendant's answer "would be effective in correcting the Defendant's conduct." Accordingly, the trial court struck Defendant's answer, leaving only the issue of damages remaining for consideration. Defendant filed written notice of appeal on 20 April 2018.

On appeal, Defendant argues, *inter alia*, that "the facts on which" the trial court granted Plaintiffs' motion to strike Defendant's answer were "so clearly erroneous" that the resulting sanctions constituted an abuse of discretion. We agree with Defendant that the order should be vacated on this ground, and therefore we need not address Defendant's remaining challenges.

Grounds for Appellate Review

Although Defendant's appeal is interlocutory, Defendant nevertheless maintains that it is entitled to an immediate appeal from the trial court's order because it affects a substantial right, in that it strikes Defendant's answer. *See Adair v. Adair*, 62 N.C. App. 493, 495, 303 S.E.2d 190, 192 ("An interlocutory order is appealable if it affects some substantial right claimed by the appellant and if it will work injury if not corrected before final judgment."), *disc. review denied*, 309 N.C. 319, 307 S.E.2d 162 (1983). Indeed, "[o]rders of this type have been described as affecting a substantial right." *Essex Grp., Inc. v. Express Wire Servs., Inc.*, 157 N.C. App. 360, 362, 578 S.E.2d 705, 707 (2003); *see also Adair*, 62 N.C. App. at 495, 303 S.E.2d at 192. Accordingly, Defendant has a right to immediate appeal from the trial court's order.

Discussion

Defendant contends that the trial court's order imposing sanctions was based upon several erroneous findings, including that Plaintiffs'

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3. Defendant does not challenge this finding by the trial court, and it is thus binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.").

motion sought to sanction Defendant "specifically for failure to supplement as required under Rule 26(e)." Defendant maintains that this finding is simply "not true," and argues, among other things, that the trial court erred when it "*sua sponte*[] made additional legal arguments to grant [Plaintiffs] the relief sought." Defendant contends that this amounted to an abuse of discretion, and therefore, the order must be vacated. We agree.

Rule 26(g) of the North Carolina Rules of Civil Procedure provides:

> (g) Signing of discovery requests, responses, and objections. — Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in that attorney's name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state that party's address. The signature of the attorney or party constitutes a certification that the attorney or party has read the request, response, or objection and that to the best of the knowledge, information, and belief of that attorney or party formed after a reasonable inquiry it is: . . . (2) not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation . . . .
>
> If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

N.C. Gen. Stat. § 1A-1, Rule 26(g) (2017).

In other words, "Rule 26(g) provides that when an attorney or party signs a discovery document, he certifies to the best of his knowledge that it has not been served for an improper purpose and is not unreasonably burdensome or expensive." *Turner v. Duke University*, 325 N.C. 152, 163-64, 381 S.E.2d 706, 713 (1989). "Such signature constitutes a certification parallel to that required by Rule 11," *Brooks v. Giesey*, 334 N.C. 303, 317, 432 S.E.2d 339, 347 (1993), and thus "sanctions under Rule 26(g) may be applied following Rule 11 case law." *Id.* at 318, 432 S.E.2d at 347.

In the instant case, Plaintiffs moved for mandatory sanctions "pursuant to Rule 26(g)" on the basis of Defendant's initial discovery responses, in which Plaintiffs contended that Defendant had "necessarily failed to identify all documents which pertain to" Defendant's professional and personal opinions of Plaintiffs. Plaintiffs alleged that Defendant's response that it had no such documents was "interposed for the improper purpose of intentionally withholding a substantial cache of damaging documents, which has served to harass plaintiffs, cause unnecessary delay, and has needlessly and exponentially increased the cost of litigation." Plaintiffs reiterated this argument during the hearing on their motion, and Defendant defended against the same.

However, the trial court imposed sanctions against Defendant more than five months after the hearing, finding that Plaintiffs had filed their motion for sanctions "specifically for failure to supplement as required *under Rule 26(e)*." (Emphasis added). The trial court concluded that Defendant failed to supplement its discovery responses as required under Rule 26(e), and struck Defendant's answer on that basis. The effect of the trial court's erroneous finding is significant and requires that the sanctions be vacated.

It is well established that "the [party] against whom sanctions are to be imposed must be advised in advance of the charges against [it]." *Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 439 (1998). While North Carolina does not require notice of the precise *type* of sanctions sought, a party is nevertheless entitled to "(1) notice of the bases of the sanctions and (2) an opportunity to be heard" thereon. *Egelhof v. Szulik*, 193 N.C. App. 612, 616, 668 S.E.2d 367, 370 (2008).

For example, in *Griffin*, "Charles Henderson had been given notice by the Bullocks that they would seek to have sanctions imposed upon him for filing a petition for an adoption." *Griffin*, 348 N.C. at 279-80, 500 S.E.2d at 438. "After the hearing, the court did not impose sanctions for the filing of the adoption petition"; instead, it "impose[d] sanctions for the filing of pleadings for which Mr. Henderson had not received notice that such sanctions would be sought." *Id.* at 280, 500 S.E.2d at 438. Our Supreme Court concluded that this was error:

> It is not adequate for the notice to say only that sanctions are proposed. The bases for the sanctions must be alleged. In this case, the notice actually misled Mr. Henderson as to what sanctions would be imposed. Mr. Henderson was notified that sanctions were proposed for filing the adoption proceeding, but sanctions were imposed for

> something else. The fact that the court made detailed findings of fact in the order for sanctions is not adequate. *In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him.*

Id. at 280, 500 S.E.2d at 439 (emphasis added) (citations omitted). Accordingly, our Supreme Court ordered that the sanctions imposed without notice be vacated. *Id.*

Similarly, in this case, Defendant was not advised, prior to the hearing, that it might be sanctioned for failure to supplement its discovery responses pursuant to Rule 26(e); wholly absent from Plaintiffs' motion was any contention that Defendant should be sanctioned on that basis.[4] Plaintiffs' motion instead sought sanctions for a violation of Rule 26(g), and the substance of the parties' arguments at the hearing reflected the same. The mere fact that the parties made scattered references at the hearing to Defendant's "ongoing obligation" to supplement its discovery responses under Rule 26(e) does not demonstrate that Defendant received proper notice that sanctions might be imposed on that basis. *See id.* ("The fact that Mr. Henderson participated in the hearing and did the best he could do without knowing in advance the sanctions which might be imposed does not show a proper notice was given.").

Accordingly, in light of the lack of notice provided, we agree with Defendant that the trial court's order imposing sanctions for a violation of Rule 26(e) must be vacated and remanded for entry of an order that is consistent with the grounds upon which Plaintiffs moved to strike Defendant's answer.[5]

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4. Plaintiffs' Rule 9(b)(5) supplement filed with this Court contains what purports to be a two-page excerpt from its "Brief in Support of Motion for Discovery Sanctions to Strike Answer," in which Plaintiffs argue that "[a]ssuming *arguendo*, that [Defendant']s verifications about the existence of the [professional and personal opinion documents] were accurate when made to the best of its knowledge at the time," Defendant still "failed to supplement its prior discovery responses pursuant to Rule 26(e)(2)." However, the excerpt indicates that the brief was signed on the same date as the hearing, and there is no certificate of service or other indication that Defendant received notice of this basis for sanctions prior to the hearing. Nor does the brief contain a file stamp demonstrating that it was filed with the trial court. In fact, at the hearing, the presiding judge commented to Plaintiffs that he did not have briefs.

5. During oral arguments before this Court, Plaintiffs contended that Defendant has abandoned any argument concerning notice because it did not raise that issue in its brief. *See* N.C.R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are

Conclusion

For the foregoing reasons, we vacate the trial court's 21 March 2018 order sanctioning Defendant by striking its answer and remand for the trial court to address the grounds for which the instant proceeding was initiated—that is, whether the trial court is mandated pursuant to Rule 26(g) to impose sanctions against Defendant for its initial certification that it possessed no documents pertaining to its professional or personal opinions of Plaintiffs, in response to Interrogatory 7 and Request 7.

VACATED AND REMANDED.

Judges STROUD and INMAN concur.

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deemed abandoned."). Indeed, Defendant did not specifically phrase its challenges to the trial court's order in terms of "notice." Defendant did, however, argue the following:

> [The trial court] found that [Defendant] had failed to supplement its response to [Interrogatory] 7 under Rule 26(e) . . . and therefore sanctioned it pursuant to Rule 37. [Plaintiffs], however, *never moved the Court to exercise its discretionary authority to sanction [Defendant]. Instead, [Plaintiffs] moved for mandatory sanctions under Rule 26(g).* . . .
>
> Instead of ruling on the appropriateness of [Plaintiffs'] motion for mandatory sanctions under Rule 26(g), [the trial court] found as fact that "[Plaintiffs] filed the 21 September 2017 Motion seeking to sanction [Defendant] for discovery violations, specifically for failure to supplement as required under Rule 26(e) . . . ." *Nowhere in [Plaintiffs' motion] is there any reference whatsoever to Rule 26(e). The only reference to supplementation made by [Plaintiffs] was at [the hearing] in relation to the argument for mandatory sanctions under Rule 26(g). Rules 26(g) and 26(e) are fundamentally different from one another* . . . .
>
> Thus, [the trial court] either (1) declined to grant [Plaintiffs] relief on the grounds they requested and, *sua sponte*, made additional legal arguments to grant them the relief sought[,] or (2) [the trial court] fundamentally misunderstood the motion that [it] granted. Such a grave overreach or misapprehension of the matters before the Court cannot be considered anything but an abuse of discretion, particularly in light of the drastic sanction it ultimately led to in this matter.

(Emphases added) (original alterations omitted). Despite the omission of the word "notice," it is nevertheless clear that the substance of Defendant's argument is a challenge to the lack of notice of the grounds upon which the trial court imposed sanctions, albeit phrased in terms of abuse of discretion.

WYGAND v. DEUTSCHE BANK TR. CO.

[265 N.C. App. 681 (2019)]

JOHN E. WYGAND AND NORMA S. WYGAND, PLAINTIFFS
v.
DEUTSCHE BANK TRUST COMPANY AMERICAS AS INDENTURE TRUSTEE FOR THE REGISTERED HOLDERS OF SAXON ASSET SECURITIES TRUST 2004-1 MORTGAGE LOAN ASSET BACKED NOTES AND CERTIFICATES, SERIES 2004-1, OCWEN LOAN SERVICING, LLC, AND TRUSTEE SERVICES OF CAROLINA, LLC, DEFENDANTS

No. COA18-1073

Filed 4 June 2019

1. Arbitration and Mediation—arbitration rider—notice provision—no right to jury trial—N.C.G.S. § 22B-10—unconscionability

In a breach of contract action, the trial court erroneously concluded that the notice provision in an arbitration rider was unconscionable pursuant to the prohibition contained in N.C.G.S. § 22B-10 against contractual waivers of jury trials. The rider's explanation that a party who agreed to arbitration gave up the right to have a dispute resolved by jury did not run afoul of section 22B-10 because the statute expressly permitted arbitration agreements—which necessarily involve the private settlement of disputes. Even if the rider violated state law, the rider would still be enforceable pursuant to the Federal Arbitration Act as provided in the rider.

2. Arbitration and Mediation—motion to compel arbitration—denial—waiver of arbitration—pursuit of litigation

In a breach of contract action filed by two homeowners against multiple entities seeking to foreclose on their home, the trial court erred by denying defendants' motion to compel arbitration based on its conclusion that, even if an arbitration rider was enforceable, defendants had waived their right to compel by pursuing litigation in a way that prejudiced the homeowners. The filing of responsive pleadings and discovery by defendants did not constitute actions inconsistent with arbitration, defendants did not delay in seeking arbitration, and there was an insufficient showing that the homeowners were prejudiced where their affidavit of legal fees did not clearly delineate how much money they expended on filing this suit compared to what they spent on a related special proceeding.

Appeal by defendants from order entered 30 May 2018 by Judge Benjamin A. Alford in Craven County Superior Court. Heard in the Court of Appeals 9 April 2019.

Stubbs & Perdue, PA, by Trawick H. Stubbs, Jr., Matthew W. Buckmiller, and Joseph Z. Frost, for plaintiffs-appellees.

Bradley Arant Boult Cummings LLP, by Brian M. Rowlson, for defendants-appellants.

BERGER, Judge.

Deutsche Bank Trust Company Americas as Indenture Trustee for the Registered Holders of Saxon Asset Securities Trust 2004-1 Mortgage Loan Asset Backed Notes and Certificates, Series 2004-1, Ocwen Loan Servicing, LLC, and Trustee Services of Carolina, LLC ("Defendants") appeal the trial court's order, which denied their motion to compel John E. Wygand and Norma S. Wygand ("Plaintiffs") to submit to binding arbitration. Defendants argue in this interlocutory appeal that they have the contractual right to demand arbitration. For the reasons stated herein, we reverse and remand.

Factual and Procedural Background

On July 2, 1998, Plaintiffs executed a Note in favor of Saxon Mortgage Corporation, which called for monthly installment payments consisting of principal and interest. The Note was secured by a Deed of Trust on Plaintiffs' primary residence located in New Bern, North Carolina. In connection with the loan, Plaintiffs executed an Arbitration Rider, which supplemented the provisions of the Deed of Trust. The Arbitration Rider stated in pertinent part:

> ARBITRATION OF DISPUTES. All disputes, claims, or controversies arising from or related to the loan evidenced by the Note, including statutory claims, shall be resolved by binding arbitration, and not by court action, except as provided under "Exclusions from Arbitration" below. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act (9 U.S.C. §§ 1-14) and the Code of Procedure of the National Arbitration Forum as in effect as of the date of this agreement. . . . Any arbitration hearing shall be conducted in the jurisdiction in which the Borrower signs this agreement, unless a different location is agreed to by Borrower and Lender. . . .
>
> EXCLUSION FROM ARBITRATION. This agreement shall not limit the right of Lender to (a) accelerate or require

> immediate payment in full of the secured indebtedness or exercise the other Remedies described in this Security Instrument before, during, or after any arbitration, including the right to foreclose against or sell the Property . . . .
>
> NOTICE. BY SIGNING THIS ARBITRATION RIDER YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS DESCRIBED IN THE 'ARBITRATION OF DISPUTES' SECTION ABOVE DECIDED EXCLUSIVELY BY ARBITRATION, AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT HAVE TO LITIGATE DISPUTES IN A COURT OR JURY TRIAL, DISCOVERY IN ARBITRATION PROCEEDINGS IS LIMITED IN THE MANNER PROVIDED BY THIS AGREEMENT. ("Notice Provision").

In February 2017, Trustee Services of Carolina, LLC commenced a special proceeding in Craven County seeking to exercise the power of sale provision in the Deed of Trust, and foreclose on Plaintiffs' real property. The foreclosure proceeding remains pending in Craven County.

On July 17, Plaintiffs filed suit in Craven County and demanded a jury trial against Defendants, alleging causes of action for breach of contract; violations of the North Carolina Debt Collection Act, North Carolina Unfair and Deceptive Trade Practices Act, North Carolina Mortgage Debt Collection and Servicing Act; defamation; and negligence. In addition, Plaintiffs sought a temporary restraining order, preliminary injunction, and permanent injunction. Defendants then filed a motion for an extension of time to file an answer or other responsive pleadings in response to Plaintiffs' complaint. On September 21, Defendants filed their answer and affirmative defenses. Plaintiffs then filed their First Set of Interrogatories and Requests for Production of Documents on September 27. After obtaining an extension of time to answer, Defendants provided their responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents on November 27. Also, on December 22, Defendants filed a motion for substitution of counsel, and an order was entered on January 10, 2018, granting this motion.

On March 16, 2018, Defendants filed a motion to dismiss, or in the alternative, to compel arbitration. Plaintiffs filed a response and memorandum of law in opposition to Defendants' motion on May 4. In support, Plaintiffs provided an Affidavit of Joseph Z. Frost ("Attorney's Affidavit"), which stated, among other things, that "through May 3, 2018,

Plaintiffs have incurred actual attorneys' fees, expenses, and costs in the amount of $40,164.51, relating to the preparation, filing, and prosecution of the above-captioned civil action, and defense of the special proceeding filed by Defendants, seeking to exercise the power of sale provision in the Deed of Trust." On March 21, the parties participated in a mediation, which resulted in a recess. Upon Defendants' request, on May 14, the trial date was moved from July 9 to August 8.

After a hearing was held on Defendants' motion to compel arbitration, the trial court entered an order on May 30, 2018, denying Defendants' motion ("Order Denying Arbitration"). In its Order Denying Arbitration, the trial court made the following pertinent findings and conclusions:

> 3. The Arbitration Rider is unconscionable and unenforceable pursuant to N.C. Gen. Stat. § 22B-10, as a matter of law, because it required that Plaintiffs, as the purported contracting parties, waive their right to jury trial. Although contractual provisions may provide procedural prerequisites or contractually limit the time, place, or manner or asserting claims, N.C. Gen. Stat. § 22B-10 expressly prohibits "any provision in a contract requiring a party to the contract to waive his right to a jury trial . . ." N.C. Gen. Stat. § 22B-10. The Arbitration Rider, which does not contain a severability clause, contains an unenforceable provision requiring Plaintiffs, as the contracting parties, to "GIV[E] UP ANY RIGHTS YOU MIGHT HAVE TO LITIGATE DISPUTES IN A COURT OR JURY TRIAL." In the absence of a severability clause, and based upon the explicit language of the Arbitration Rider requiring that Plaintiffs waive or "give up" their right to a jury trial, the Arbitration Rider is unconscionable and unenforceable, pursuant to N.C. Gen. Stat. § 22B-10, as a matter of law.
>
> 4. However, and even if the Arbitration Rider was not unenforceable as a matter of law pursuant to N.C. Gen. Stat. § 22B-10, Defendants—by and through its course of conduct and actions—have waived any purported right to compel or require arbitration of the claims for relief asserted in the Complaint filed by Plaintiffs. . . .

Defendants appeal, arguing that the trial court erred when it denied their motion to compel arbitration. We agree.

Analysis

We must initially note that Defendants' appeal is interlocutory. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). "Generally, there is no right of immediate appeal from interlocutory orders and judgments. It is, however, well established that an order denying a motion to compel arbitration [affects a substantial right and] is immediately appealable." *Cornelius v. Lipscomb*, 224 N.C. App. 14, 16, 734 S.E.2d 870, 871 (2012) (citations and quotation marks omitted). Therefore, Defendants' appeal is properly before us.

> The standard governing our review of this case is that findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if ... there is evidence to the contrary. Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal. Because unconscionability is a question of law, this Court will review *de novo* the trial court's conclusion that the arbitration agreement contained in plaintiffs' loan agreements is unconscionable.

Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008) (citations and quotation marks omitted).

[1] Defendants contend that the trial court erred in concluding that the Arbitration Rider was unconscionable pursuant to N.C. Gen. Stat. § 22B-10. We agree.

Section 22B-10 states:

> Any provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable. This section does not prohibit parties from entering into agreements to arbitrate or engage in other forms of alternative dispute resolution.

N.C. Gen. Stat. § 22B-10 (2017). Section 22B-10 cannot be read as equating contracts *with* an arbitration clause to those contracts *that do not contain* an arbitration clause. The language of this section could not be clearer: the proscription against contractual waivers of jury trials "*does not prohibit* parties from entering into agreements to arbitrate or

engage in other forms of alternative dispute resolution." N.C. Gen. Stat. § 22B-10 (emphasis added).

Moreover, "North Carolina has a strong public policy favoring arbitration of disputes between parties. Our strong public policy requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration." *Miller v. Two State Constr. Co.*, 118 N.C. App. 412, 416, 455 S.E.2d 678, 680-81 (1995) (citations and quotation marks omitted). "Once an agreement to arbitrate is found, courts should compel arbitration on a party's motion and then step back and take a hands-off attitude during the arbitration proceeding." *Id.* at 415, 455 S.E.2d at 680 (citation and quotation marks omitted).

"An agreement to arbitrate a dispute is not an unenforceable contract requiring waiver of a jury," and "there is no constitutional impediment to arbitration agreements." *Id.* at 416-17, 455 S.E.2d at 681. In *Miller v. Two State Construction Company*, this Court held that "the trial court erred in concluding that because the arbitration provision did not provide for trial of facts by a jury that it was unconscionable and unenforceable under North Carolina General Statutes § 22B-10, and in violation of Article I §§ 18 and 25 of the North Carolina Constitution." *Miller*, 118 N.C. App. at 416, 455 S.E.2d at 681.

Thus, Section 22B-10 expressly permits parties to enter into arbitration agreements. "Arbitration may be defined as a method for the settlement of disputes and differences between two or more parties, whereby such disputes are submitted to the decision of one or more persons specially nominated for the purpose, either instead of having recourse to an action at law, or, by order of the Court, after such action has been commenced." *Arbitration*, Black's Law Dictionary (10th ed. 2014) (quoting John P.H. Soper, *A Treatise on the Law and Practice of Arbitrations and Awards* 1 (David M. Lawrence ed., 5th ed. 1935)). Further, this Court has stated that arbitration is "a process to privately adjudicate a final and binding settlement of disputed matters quickly and efficiently, without the costs and delays inherent in litigation." *Canadian Am. Ass'n of Prof'l Baseball, Ltd. v. Ottawa Rapidz*, 213 N.C. App. 15, 18, 711 S.E.2d 834, 837 (2011) (citation and quotation marks omitted). Therefore, arbitration necessarily settles disputed matters without a jury trial.

Here, the Notice Provision simply explains that by agreeing to arbitration, any disputes would be settled without a jury. Such contractual provisions which define or explain arbitration do not run afoul of Section 22B-10, and including an explanation of what a party forfeits when it agrees to arbitrate any disputes in an arbitration agreement does not

render the arbitration agreement unenforceable. Accordingly, the trial court erred when it concluded that the Arbitration Rider was unconscionable pursuant to Section 22B-10.

Even if Section 22B-10 could be read as allowing arbitration clauses, yet precluding waivers of jury trials, here, the Arbitration Rider is still enforceable pursuant to the Federal Arbitration Act.

"[S]tate law generally governs issues concerning the formation, revocability, and enforcement of arbitration agreements." *Park v. Merrill Lynch*, 159 N.C. App. 120, 122, 582 S.E.2d 375, 378 (2003). However, "[i]f the parties affirmatively chose the FAA to govern an agreement to arbitrate, then the FAA will apply to that agreement." *Bailey v. Ford Motor Co.*, 244 N.C. App. 346, 350, 780 S.E.2d 920, 924 (2015) (citation omitted) (determining that the FAA applied to any disputes arising from the parties' arbitration agreement after noting the trial court should have addressed this issue).[1] The FAA is "enforceable in both state and federal courts," *Park*, 159 N.C. App. at 122, 582 S.E.2d at 377, and "the FAA preempts conflicting state law, including any state statutes that render arbitration agreements unenforceable." *Sillins v. Ness*, 164 N.C. App. 755, 757, 596 S.E.2d 874, 876 (2004). More specifically, "[t]he FAA only preempts state rules of contract formation which single out arbitration clauses and unreasonably burden the ability to form arbitration agreements ... with conditions on (their) formation and execution ... which are not part of the generally applicable contract law." *Park*, 159 N.C. App. at 122, 582 S.E.2d at 378 (citations and quotation marks omitted).

> [T]he United States Supreme Court has issued two important opinions on the use of state law to set aside an arbitration agreement when that agreement is governed by the FAA: *AT&T Mobility v. Concepcion*, ___ U.S. ___, 179 L. Ed. 2d 742 (2011) (determining that the FAA preempted California's judicial rule prohibiting class waivers in consumer arbitration agreements contained within contracts of adhesion) and *American Express Co. v. Italian Colors Rest.*, ___ U.S. ___, 186 L. Ed. 2d 417 (2013) (holding that the FAA does not permit courts to invalidate an arbitration agreement on the grounds that it does not permit class arbitration).

King v. Bryant, 369 N.C. 451, 459-60, 795 S.E.2d 340, 346, *cert. denied*, 138 S. Ct. 314, 199 L. Ed. 2d 233 (2017) (citation and quotation marks omitted).

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1. On appeal, Plaintiffs do not dispute the applicability of the FAA.

Our Supreme Court then emphasized that, "[w]hile both *Concepcion* and *Italian Colors* dealt with class action waivers, *underlying those decisions was a broader theme that unconscionability attacks that are directed at the arbitration process itself will no longer be tolerated*." *Id.* at 460, 795 S.E.2d at 346 (quoting *Torrence v. Nationwide Budget Finance*, 232 N.C. App. 306, 321, 753 S.E.2d 802, 811 (2014)) (emphasis added).

As stated above, Section 22B-10 does not burden the formation of contracts with arbitration clauses. However, even if we presume *arguendo* that it does, the contract dictates that FAA governs review of the Arbitration Rider. Because the FAA preempts state statutes that render arbitration agreements unenforceable, Section 22B-10 cannot be interpreted or used to set aside the parties' Arbitration Rider, and the trial court erred when it purported to interpret Section 22B-10 to render the Arbitration Rider unconscionable.

[2] In addition, the trial court's Order Denying Arbitration concluded that, even if the Arbitration Rider was enforceable, Defendants had waived their right to compel arbitration by utilizing the "litigation machinery," which in turn, prejudiced Plaintiffs. On appeal, Defendants argue these conclusions are erroneous. We agree.

As stated above, "state law generally governs issues concerning the formation, revocability, and enforcement of arbitration agreements." *Park*, 159 N.C. App. at 122, 582 S.E.2d at 378. "Since the right to arbitration arises from contract, it may be waived in certain instances." *T.M.C.S., Inc. v. Marco Contractors, Inc.*, 244 N.C. App. 330, 340, 780 S.E.2d 588, 595 (2015) (citation omitted).

> Waiver of a contractual right to arbitration is a question of fact. Because of the strong public policy in North Carolina favoring arbitration, courts must closely scrutinize any allegation of waiver of such a favored right. Because of the reluctance to find waiver, we hold that a party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration.
>
> A party may be prejudiced if, for example, it is forced to bear the expenses of a lengthy trial; evidence helpful to a party is lost because of delay in the seeking of arbitration; a party's opponent takes advantage of judicial discovery procedures not available in arbitration; or, by reason of

> delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon.

Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 229-30, 321 S.E.2d 872, 876-77 (1984) (citations omitted).

"[T]he mere filing of pleadings by both parties to a contract containing an arbitration agreement does not constitute waiver of the arbitration provision as a matter of law[.]" *Id.* at 232, 321 S.E.2d at 878. Also, "[r]esponding to discovery requests promulgated by an opposing party—or . . . failing to respond to discovery requests—does not constitute making use of discovery not available in arbitration." *Herbert v. Marcaccio*, 213 N.C. App. 563, 568, 713 S.E.2d 531, 535 (2011). In addition, "inconveniences and expenses consistent with normal trial preparation" will not be considered detrimental spending. *Smith v. Young Moving & Storage, Inc.*, 141 N.C. App. 469, 473, 540 S.E.2d 383, 386 (2000) (citations and quotation marks omitted).

Moreover, "when considering whether a delay in requesting arbitration resulted in significant expense for the party opposing arbitration, the trial court must make findings (1) whether the expenses occurred after the right to arbitration accrued, and (2) whether the expenses could have been avoided through an earlier demand for arbitration." *Herbert*, 213 N.C. App. at 568, 713 S.E.2d at 536. When the trial court fails to make findings indicating whether any legal fees incurred resulted from delay in demanding arbitration or whether they were incurred prior to a demand for arbitration, a trial court cannot conclude the party opposing arbitration was prejudiced by having expended significant expenses in litigation costs. *McCrary ex rel. McCrary v. Byrd*, 148 N.C. App. 630, 639-40, 559 S.E.2d 821, 827 (2002) (emphasizing that expenses incurred in pursuit of claims in a separate action cannot be calculated to support a finding of significant expense).

Here, the trial court made the following findings regarding Defendants' actions and conduct inconsistent with arbitration:

> A. The filing of multiple pleadings with this Court, including the Answer and requests for extensions of certain deadlines and continuances of the Trial, which neglected to raise any right to demand arbitration relief under the Arbitration Rider or otherwise requesting—at any point between service of the Complaint on July 21, 2017, through March 15, 2018—to compel arbitration of the claims for relief in the Complaint;

B. The commencement and continued prosecution of the Foreclosure Proceeding, seeking to foreclose on its purported interest, lien and encumbrance in the Property, which involved the same legal and factual issues as those affirmative claims asserted by Plaintiffs in the Complaint;

C. Agreeing to, and participating in, the Mediation, which was recessed and not declared an impasse by the Mediator;

D. Engaging in certain actions and pursuing a litigation strategy, in the above-captioned civil action, which resulted in Plaintiffs expending additional attorneys' fees, expenses, and costs associated with litigating the matter before this Court; and

E. Preparing and serving on Plaintiffs, through their counsel, the Ocwen Written Discovery Responses, which included production of thousands of pages of documents, materials, and items in connection therewith.

Although Defendants did file an answer in response to Plaintiffs' complaint, "the mere filing of pleadings by both parties to a contract containing an arbitration agreement does not constitute waiver of the arbitration provision as a matter of law[.]" *Cyclone Roofing Co.*, 312 N.C. at 232, 321 S.E.2d at 878. Moreover, Plaintiffs, not Defendants, initiated discovery when Plaintiffs filed their First Set of Interrogatories and Requests for Production of Documents on September 27, 2017. Because "[r]esponding to discovery requests promulgated by an opposing party . . . does not constitute making use of discovery not available in arbitration," *Herbert*, 213 N.C. App. at 568, 713 S.E.2d at 535, Defendants' responses cannot be considered making use of the litigation machinery. Furthermore, after moving for arbitration, "subsequent participation in mediation, absent a specific waiver of arbitration, is not 'inconsistent with arbitration' and does not constitute an implied waiver of arbitration." *O'Neal Constr., Inc. v. Leonard S. Gibbs Grading, Inc.*, 121 N.C. App. 577, 580-81, 468 S.E.2d 248, 250 (1996) (citation omitted). Because Defendants did not delay in moving for arbitration or act inconsistently with arbitration, the trial court erred in determining that Defendants had waived their right to arbitration under this factor.

The trial court also made the following findings regarding how Plaintiffs were prejudiced by its expenditure of $40,164.51 and 112 hours of legal services:

> 6. The delay by Defendants in electing to exercising *(sic)* their purported rights to demand arbitration under the Arbitration Rider, in addition to the foregoing inconsistent actions and steps that they undertook, were prejudicial to Plaintiffs, as they were required to expend significant time, resources, and expenses in prosecuting and litigating this action following the filing of the Complaint with this Court on July 17, 2017, which is the time at which Defendants' purported right to arbitration, under the Arbitration Rider, accrued.
>
> 7. All of the costs and expenses that Plaintiffs have incurred, including the substantial attorneys' fees and expenses reflected in the Attorney's Affidavit, totaling $40,164.51, were attributable solely to the positions taken by Defendants, were for naught if this action were to be abruptly sent to arbitration after engaging in pretrial discovery in this multi-proceeding litigation.

The Attorney's Affidavit indicated that a substantial amount of time and effort had been expended in "preparing the requisite pleadings, and attending the hearings held by the Court, preparation of written discovery and reviewing responses and any responsive documentation produced in connection therewith, both in the above-captioned civil action, and the related special proceeding." The Attorney's Affidavit further noted that "through May 3, 2018, Plaintiffs have incurred actual attorneys' fees, expenses, and costs in the amount of $40,164.51, relating to the preparation, filing, and prosecution of the above-captioned civil action, and defense of the special proceeding filed by Defendants, seeking to exercise the power of sale provision in the Deed of Trust."

Although the Affidavit indicates that 112 hours of legal services and $40,164.51 had been expended, the Affidavit does not distinguish how much time or expense was actually expended on filing suit and pursuing *this proceeding* as opposed to the special proceeding. The special proceeding was not only excluded from arbitration as stated in the Arbitration Rider, but it was also filed prior to July 17, 2017. Thus, any time or expense spent on that proceeding are immaterial to our determination of prejudice in this proceeding. *McCrary*, 148 N.C. App. at 639-40, 559 S.E.2d at 827. Because it is unclear how much money Plaintiffs have expended in legal fees prior to and after Defendants' demand for arbitration, the trial court erred in concluding Plaintiffs were prejudiced by having expended $40,164.51 in litigation costs.

Thus, the trial court also erred when it concluded that Defendants had waived their contractual right to compel arbitration by acting inconsistently with arbitration, and that as a result, Plaintiffs had been prejudiced. Accordingly, we reverse and remand the trial court's Order Denying Arbitration.

Conclusion

The trial court erred in concluding that the Arbitration Rider was unconscionable. The trial court also erred when it concluded in the alternative, that Defendants had waived their right to compel arbitration through their course of conduct, which in turn, prejudiced Plaintiffs. Therefore, we reverse and remand for entry of an order directing the parties to submit to arbitration consistent with the terms of the Arbitration Rider and the FAA.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 JUNE 2019)

DAY v. AM. AIRLINES No. 18-1125	N.C. Industrial Commission (16-021415)	Affirmed
HARR v. WRAL-5 NEWS No. 19-88	Wake (18CVS6382)	Affirmed
IN RE I.G.A. No. 18-1179	Henderson (17JA212) (17JA213)	Affirmed in part; Vacated in part and Remanded.
IN RE J.H.B. No. 18-1030	Ashe (17JA5)	Affirmed
IN RE L.B. No. 18-815	Polk (15JT22) (15JT23)	Affirmed
IN RE M.F. No. 18-1064	Mecklenburg (16JT290-291)	Affirmed
IN RE N.J.M. No. 18-1154	Craven (18JB23A)	Reversed and Remanded
LUKE v. WOODLAWN SCH. No. 18-1109	Iredell (17CVS3116)	Affirmed in part, Dismissed in part
MARTINSON v. MECKLENBURG CTY. DEP'T OF SOC. SERVS. No. 18-1313	Mecklenburg (18JRI10) (18JRI11)	Affirmed
McLAMB v. TOWN OF SMITHFIELD No. 18-1235	Johnston (17CVS3879)	Affirmed in part; reversed in part and remanded in part.
MECUM AUCTION, INC. v. McKNIGHT No. 18-1208	Mecklenburg (18CVS13202)	Affirmed
N.C. STATE BAR v. WECKWORTH No. 18-866	N.C. State Bar (16DHC22)	Affirmed in part; Reversed in part; and Remanded.
PANGEA CAPITAL MGMT., LLC v. LAKIAN No. 18-956	Macon (17CVS121)	Affirmed

STATE v. BENSON No. 18-732	Person (15CRS52053)	No Error
STATE v. CSEH No. 18-1288	Cherokee (16CRS50067) (16CRS50070-71)	No Error
STATE v. FORNEY No. 18-418	Mecklenburg (10CRS232870) (15CRS25910)	No Error
STATE v. HARRIS No. 18-910	Mecklenburg (16CRS20916) (16CRS217718-22) (16CRS217727-29) (16CRS217731-33) (16CRS217736)	No Error
STATE v. HOSKINS No. 18-1181	Mecklenburg (15CRS231863) (15CRS231865) (15CRS231868-74) (15CRS231879-81) (16CRS1677)	No Error
STATE v. McMAHAN No. 18-672	Buncombe (15CRS5521) (15CRS93241)	Vacated
STATE v. QUEEN No. 18-819	Gaston (16CRS63218) (17CRS2071) (17CRS2073)	No error in part; Reversed in part.
STATE v. STURDIVANT No. 18-1004	Guilford (88CRS52529-30)	New Trial

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